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SYDEL FINFER, a minor, by her father and next friend, JOSEPH FINFER,)
Appellant,) APPEAL FROM SUPERIOR
v.) COURT, COOK COUNTY.
JENNIE TUREK,)
Appellee.)

347 I.A. 72

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION OF THE COURT.

Plaintiff Sydel Finfer, by her father and next friend Joseph Finfer, brought suit against the defendant, Jennie Turek, for damages arising out of personal injuries allegedly sustained when plaintiff fell on torn stair carpeting in a building owned and managed by defendant. A trial by jury resulted in a verdict of not guilty, and from a judgment entered on such verdict plaintiff appeals.

The errors relied on are that the verdict was against the manifest weight of the evidence; that proper evidence was excluded and improper evidence admitted; that prejudicial and inflammatory remarks were made by counsel for defendant in argument to the jury; that proper instructions were refused and improper instructions given.

The evidence tends to establish the following facts: On November 25, 1946, plaintiff, then a minor 13-1/2 years of age, resided with her parents in an apartment on the third floor of a three-flat, English basement type building at 3342 West Douglas boulevard, Chicago. Entrance from the street was through a door opening into a vestibule which contained an inner door with a glass panel. Access to the stairs was gained by entering this

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second floor. The stairway commenced at the ground floor level, and four or five stairs ascended to a landing, then the stairs reversed themselves and ascended eight steps to the first floor landing. From the first floor landing the stairs ascended to the second and third floors. At the top of the stairwell, above the third floor landing, there was a glass skylight. At 8:00 a.m. on the above date plaintiff was descending the stairs and was between the first floor and the ground floor, when, according to her testimony, "the heel of my shoe caught in the carpet and I fell to the landing." It is contended that plaintiff's fall was occasioned by a hole in the carpeting, the presence of which was unascertainable by virtue of the lack of proper lighting in the stairwell. Defendant admits that the carpeting contained worn places, although asserting that on the whole it was in a reasonable state of repair, but insists there is no proof that plaintiff's fall was occasioned by any hole in the carpeting.

We feel that plaintiff's own testimony on the material, controverted facts fails to show, or at least raises a question for the jury, whether or not she fell as a result of any defective condition in the carpeting. As indicated above, on direct examination, she said: "The heel of my shoe caught on the carpeting and I fell to the landing." It is significant that she does not say that her heel caught in a hole in the carpeting. Further on cross-examination the question was asked, "And you never saw any hole in the carpet there, did you?" Answering she

stated, "No. I never saw any hole." It appears that the word "there" had reference to the place where plaintiff fell. There were no other eyewitnesses to the fall so that plaintiff's testimony on this vitally important circumstance is all the testimony in the record.

While there is considerable evidence that the carpeting was in a state of disrepair and that there were worn places in the carpeting, there is a complete absence of proof that such condition was responsible for the plaintiff's fall. Furthermore, plaintiff had lived in the building for about six years prior to the fall and she testified that she had never seen any hole in the carpeting "there."

Plaintiff further testified that at the place where she fell it was dark and that she was holding on to a railing provided for that purpose. There is considerable testimony in the record that complaint had been made about the torn carpeting and the lighting conditions over some period of time prior to the date of the accident. However, there was competent testimony for the jury that no complaints were ever made by the tenants as to the condition of the lights in the hall. A representative of the Commonwealth Edison Company testified that the electric current served to the hall stairway furnished continuous lights, as indicated by the meter reading. There was testimony that the lighting facilities in the hall were such as were usually provided in similar buildings. There was also testimony that the skylight at the top of the stairwell could be seen from the

first floor. One of the tenants testified that the lighting conditions were good. We think that an issue of fact was raised on this question and that the jury's determination is decisive.

The mere happening of an accident raises no presumption of negligence. Rotche v. Buick Motor Co., 358 Ill. 507; Huff v. Illinois Central R. R. Co., 362 Ill. 95. When this court is asked to set aside a verdict the prevailing party is entitled to all the favorable inferences legitimately arising from the evidence. Toombs v. Lewis, 362 Ill. 181; Fugett v. Murray, 311 Ill. App. 323.

Plaintiff cites a number of instances of improper exclusion and admission of evidence offered, only a few of which we think are of sufficient importance to discuss. Some of these objections had to do with the plaintiff's injuries, and in our view of the case the nature and extent of the plaintiff's injuries are not a consideration here. Considerable point is made of the fact that upon cross-examination objection was sustained to a question propounded to the defendant as to what she did with the old torn piece of carpeting. As we have heretofore indicated, no competent proof was adduced that a torn carpet was the cause of this fall. Aside from the impropriety of the form of the question, it also is immaterial under the state of the proof and objection was properly sustained by the trial judge.

Objection is made that the court committed error in admitting in evidence three photographs offered by defend-

ant for the express purpose of portraying the architectural structure of the hall stairway and the skylight above. Plaintiff contends that because these photographs were taken some time after the accident and at a time when the carpeting complained of had either been repaired or removed, their admission in evidence was prejudicial. We think that this objection is without merit. The structural condition of the building was material. One of the issues was whether reasonable provision had been made for properly lighting the stairwell. The pictures taken bore on that question insofar as provision for natural light is concerned. The court admitted them for that limited purpose. We do not see how the jury could have been misled to plaintiff's prejudice under these circumstances. Nor is there any merit to the contention that no proof was offered that the condition of the stairway was the same when the photographs were taken as on the day of the occurrence. The janitor testified very clearly that the picture portrayed the skylight as it appeared in the building in November of 1946.

We have carefully examined the argument of counsel complained of and are of the opinion that it did not exceed legitimate bounds. The trial judge heard the remarks and was in much better position than we to observe the effect on the jury, and we are persuaded that there was no abuse of discretion in denying a new trial on this ground. What we said in Reinmueller v. Chicago Motor Coach Co., 341 Ill. App. 178, applies here.

Plaintiff offered the following instruction on

contributory negligence:

"In considering the question of contributory negligence the jury must take into consideration the age of the minor and if it appears from the evidence that the child is between the ages of 7 and 14, the minor does not have to prove that she was not guilty of contributory negligence."

The court was correct in refusing the instruction. It would have been error to give the instruction in the form tendered, for the reason that the jury might well have concluded therefrom that a child between the ages of 7 and 14 could not be guilty of contributory negligence. Such is not the law. The rule has been amply covered in Wolczek v. Public Service Co., 342 Ill. 482. We are of the opinion that no prejudicial error was committed in giving the instructions on behalf of defendant covering contributory negligence. We have examined the other instructions complained of and find no prejudicial error.

Finally, plaintiff argues that her counsel failed to interpose objections that he had a right and duty to interpose and that the plaintiff being a minor, the obligation was on the court, of its own motion, to take steps to rectify counsel's omissions. A careful review of the evidence in this case indicates no abuse of discretion on the part of the trial court in ruling upon protecting the interest of this minor. On the contrary it appears that the trial was conducted in a judicious and orderly manner, that the rights of the minor plaintiff were amply protected, and that the verdict was reached after a full, fair and complete hearing.

1. The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations (1) for arbitrary values of the parameters α and β . It is shown that the system has solutions for all values of the parameters α and β if the function $f(x)$ is continuous and has a bounded derivative.

2. In the second part of the paper the problem of the existence of solutions of the system of equations (1) for arbitrary values of the parameters α and β is solved. It is shown that the system has solutions for all values of the parameters α and β if the function $f(x)$ is continuous and has a bounded derivative. The solutions are obtained in explicit form. It is shown that the solutions are unique for all values of the parameters α and β if the function $f(x)$ is continuous and has a bounded derivative.

3. In the third part of the paper the problem of the existence of solutions of the system of equations (1) for arbitrary values of the parameters α and β is solved. It is shown that the system has solutions for all values of the parameters α and β if the function $f(x)$ is continuous and has a bounded derivative. The solutions are obtained in explicit form. It is shown that the solutions are unique for all values of the parameters α and β if the function $f(x)$ is continuous and has a bounded derivative.

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The judgment of the Superior Court of Cook County is affirmed.

Judgment affirmed.

Schwartz and Robson, JJ., concur.

45571

CITY OF CHICAGO,
Appellee,

v.

TOM MORETTI,
Appellant.

341 I.A. 731

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE TUOHY DELIVERED THE OPINION OF THE
COURT.

Defendant was found guilty by a jury in the Municipal Court of Chicago on charges, one of resisting a police officer, and the other a violation of Section 193-1 of the Municipal Code--the so-called disorderly conduct ordinance. On the former charge he was fined \$50 and on the latter \$100, from both of which judgments he appeals.

Defendant contends (1) that the verdict of the jury is against the manifest weight of the evidence; (2) that the complaints state no cause of action; (3) that the arrest was illegal; and (4) that prejudicial testimony was permitted to go to the jury.

The complaining witness in this case was one Edna Laut, who resided in the near north side in the City of Chicago. She testified that shortly before midnight on Saturday, June 17, 1950, she walked to a corner in the vicinity of her home to purchase a newspaper, when she was accosted by a man, later identified as the defendant, who attempted a conversation; that when she told him to mind his own business he rejoined with a foul remark and continued to follow her, catching hold of her dress and

pulling it up. Tearing herself away, the witness threatened to call the police, whereupon the defendant uttered extremely vile and lewd remarks. Witness went directly to the Hudson avenue police station in the vicinity, told her story to the desk sergeant, and returned to the corner with two police officers, Messrs. Barrett and Schuh. Not finding the accoster on the corner, they looked into a tavern in the vicinity and there the witness pointed to the defendant as the individual who had annoyed her. The witness testified that the police officers walked up to defendant; that Officer Schuh showed his star and Officer Barrett said, "'You are under arrest'"; that defendant said, "'What for?'" ; that the battle then started. She stated: "I don't know what was said; I couldn't tell you. I got so excited I flew behind the bar." She further testified that defendant resisted when the officer told him to come along, "'You are under arrest.'"

Officer Schuh verified the complaint made by Mrs. Laut and testified that he accompanied her to the tavern where she pointed out as her accoster the defendant; that he said "You are under arrest"; that defendant said, "'For What?'" ; that after some parley he reached over to get defendant's arm and in vile language was warned to keep his hands off, whereupon defendant jumped on the bar and kicked at the witness; that Officer Barrett grabbed defendant by the legs and both men went to the floor; that there was a violent scuffle and finally when defendant was

released he got to his feet and kicked the witness in the groin; that shortly thereafter the witness went to the corner and put in a call for help, which was followed by the arrival of several squad cars; and thereupon defendant was handcuffed and taken to the police station.

Officer Barrett corroborated the complaining witness, and his story of the occurrence in the tavern is substantially the same as Officer Schuh's. He stated that when Officer Schuh told defendant he was under arrest, the latter jumped on the top of the bar and in a sitting position "made a pass at Schuh" and kicked up with his knee; that thereupon the witness started for defendant and defendant kicked the witness in the stomach; that he got defendant's head under his arm and while he was trying to hold him defendant bit him through the clothes at the waistline; that thereupon a bloody scuffle occurred, participated in by the two police officers and defendant; that defendant stated that if he had his gun he would kill the officers; that defendant spat at them; that some bystander attempted to interfere with the arrest and the witness drew his gun to prevent any interference.

The defendant received severe cuts and lacerations in the melee and was taken to Henrotin Hospital from the police station. The police officers denied that defendant was struck prior to the time that he resisted the arrest.

Defendant in his own behalf testified that he had left his restaurant about midnight and went next door to

the tavern where the episode occurred; that he was sitting at the bar where about ten other people were present, and a round of drinks had been ordered; that Officer Schuh and the complaining witness walked in; that the officer came over, grabbed him by the shoulder and said, "'Come on, let's go'"; that he assumed they were policemen; that as he turned around one of the two men struck him on the top of the head with a pair of handcuffs, causing a wound requiring four stitches to be closed; that the other police officer then assaulted him, knocking out two teeth; that later when he was brought to the police station the two police officers attacked him and knocked him down and kicked him in the eye; that after he was given a severe beating in the police station he was taken to Henrotin Hospital where his eye and head wounds were sewed. He further stated that he had no idea why he was arrested and denied that he had accosted Mrs. Laut.

Thomas Abbott, who was in the tavern on the night in question, testified that the police officers walked in with complaining witness; that she pointed at defendant; that the police officer said to defendant, "'Let's go'"; that defendant said, "'What do you mean, let's go'"; that defendant got up as if to leave when Officer Schuh grabbed him and that Barrett struck him first.

Nimrod Solomon, a witness on behalf of defendant, testified that he was standing at a window near the corner when complaining witness came and that he had some conver-

sation with her and she said, "'I will call the police'"; that he then went into the tavern and saw defendant there, and had left to pick up defendant's car at his request when the affray in the tavern took place.

William Solomon, called on behalf of the defendant, stated that he was with defendant on the night of the occurrence; that defendant was not on the street at all from about 10:45 p.m., but that they were in defendant's restaurant and the adjoining tavern; that Mrs. Laut and the policemen walked in about twelve o'clock and she pointed to defendant; that Officer Schuh said, "'Let's go'"; that defendant got up from his seat and started to go when Officer Barrett turned around and started slugging defendant; that the first blow was struck with handcuffs.

Peter Chochos was also in the tavern and seated at the bar, to the left of defendant. He stated that the officers came in and said, "'Come on, let's go'"; that defendant said, "'What do you mean, let's go'"; that one of the officers put his hand on defendant's shoulder and yanked defendant; that defendant fell to the floor and the fight between defendant and the officers took place.

This testimony indicates there was a conflict as to who started the melee in the tavern. That the officers came in seeking to arrest defendant and that there was resistance is undisputed. Defendant admitted that he presumed that they were police officers before the resis-

tance occurred. From a review of this evidence we cannot see how the jury could have arrived at any conclusion other than that defendant was guilty on both of the charges, namely, resisting a police officer and disorderly conduct, that is to say, in the language of the ordinance, he did make an "improper noise, riot, disturbance, breach of peace, or diversion tending to a breach of the peace, within the limits of the city."

It is further argued that the complaint in the cause charging that defendant "did resist a Police Officer" is insufficient inasmuch as it should have alleged that the resistance was while the police officer was "in the discharge of his duties." Defendant's objection is based upon Section 33 of Chapter 11 of the Municipal Code of Chicago, which sets out the offense in the following language:

"Any person who shall resist any officer of the police department in the discharge of his duties * * * shall be fined * * *."

These being violations of municipal ordinances, they are tried and reviewed as civil proceedings. City of Chicago v. Terminiello, 400 Ill. 23; City of Chicago v. Williams, 254 Ill. 360. That being so, the rules of civil procedure in the Municipal Court of Chicago apply, and rule 37 of the Civil Practice Rules merely requires that the complaint be sufficient to reasonably inform the defendant of the nature of the case against him. We think that the complaint in the instant case complies with the Civil Practice Rules of the Municipal Court.

1. The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that proper record-keeping is essential for the transparency and accountability of the organization.

2. The second part outlines the procedures for handling financial data, including the collection, analysis, and reporting of information. It details the steps involved in ensuring that all data is correctly entered and verified.

3. The third part addresses the role of the accounting department in providing timely and accurate financial statements. It highlights the need for regular communication and collaboration between the accounting team and other departments.

4. The fourth part discusses the importance of internal controls and the measures taken to prevent fraud and mismanagement. It describes the various checks and balances in place to ensure the integrity of the financial system.

5. The fifth part covers the process of budgeting and forecasting, which is crucial for the long-term success of the organization. It explains how the accounting department works closely with management to develop realistic financial plans.

6. The sixth part discusses the importance of staying up-to-date with changes in tax laws and regulations. It emphasizes the need for continuous education and training for the accounting staff.

7. The seventh part addresses the importance of maintaining accurate records of all transactions. It emphasizes that proper record-keeping is essential for the transparency and accountability of the organization.

8. The eighth part outlines the procedures for handling financial data, including the collection, analysis, and reporting of information. It details the steps involved in ensuring that all data is correctly entered and verified.

9. The ninth part addresses the role of the accounting department in providing timely and accurate financial statements. It highlights the need for regular communication and collaboration between the accounting team and other departments.

10. The tenth part discusses the importance of internal controls and the measures taken to prevent fraud and mismanagement. It describes the various checks and balances in place to ensure the integrity of the financial system.

11. The eleventh part covers the process of budgeting and forecasting, which is crucial for the long-term success of the organization. It explains how the accounting department works closely with management to develop realistic financial plans.

12. The twelfth part discusses the importance of staying up-to-date with changes in tax laws and regulations. It emphasizes the need for continuous education and training for the accounting staff.

Defendant further complains that the arrest was illegal, for the reason that the police officers had no warrant and that a warrant is a condition precedent to an arrest for a violation of a municipal ordinance. The record does not show that this point was raised below, and in People v. Pacho, 362 Ill. 568, the court held that where no objection was made in the trial court that the arrest was illegal, objection will not be considered for the first time in a reviewing court. Moreover, defendant's contention is without authoritative support. In People v. Edge, 406 Ill. 490, in discussing the circumstances out of which a lawful arrest may be made without a warrant, the court quoted from Section 4, Division VI of the Criminal Code (Ill. Rev. Stat. 1949, chap. 38, par. 657) which provides as follows:

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37.632

"An arrest may be made by an officer or by a private person without warrant, for a criminal offense committed or attempted in his presence, and by an officer, when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it."

In the instant case the complaining witness had reported to the police that she had been accosted and assaulted by an unknown man and that there was reason to believe that he was in the vicinity. It was a reasonable supposition that if the man was to be apprehended there was no time to wait for the issuance of a warrant, and under the circumstances the police officers were entitled to believe the statement of the complaining witness that a crime had been committed.

It is also argued that the offense, because it merely constituted a violation of an ordinance, was not a crime. In the Edge case the court said at page 497:

"The term 'criminal offense' in this section includes all felonies, however great, and all misdemeanors, however slight. (People v. Ford, 356 Ill. 572; People v. Davies, 354 Ill. 168.) While an action for a violation of a municipal ordinance is both tried and reviewed as a civil proceeding * * * this does not preclude a violation of a municipal ordinance, subjecting the offender to the penalty of a fine, from being a 'criminal offense,' within the contemplation of the statute on arrest."

We find these contentions of defendant to be without merit.

Finally, complaint is made with respect to prejudicial testimony and improper questions. As to some of these, answers were stricken, and as to other portions the objections came after answer and were sustained. In the main they related to what occurred in the police station after the arrest and concerned threats made by the defendant of physical violence, death, and punishment through the medium of his brothers who were on the police force. These questions and answers, whether proper or not, did not in our opinion influence the verdict of the jury, for the reason that there was already in the record substantial evidence that the same threats occurred in the tavern and it is not denied that that testimony was material. The ~~conversations~~ in the police station were merely repetitious and did not constitute prejudicial error.

Accordingly, the judgments of the Municipal Court of Chicago are affirmed.

Judgments affirmed.

Schwartz and Robson, JJ., concur.

45609

MARLENE SEAHOLM, a minor, by
DELPHINE SEAHOLM, her mother
and next friend,

Appellant,

v.

FRANK C. DAVIS,

Appellee.

347 I.A. 73²

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE TUOHY DELIVERED THE OPINION
OF THE COURT.

Plaintiff, a ten year old girl, filed suit by her
mother and next friend against the defendant claiming
damages for personal injuries allegedly sustained through
the negligence of defendant. There was a trial by jury,
a verdict of not guilty, and a judgment on the verdict.

Plaintiff contends that the verdict is against
the manifest weight of the evidence, that the jury was
improperly instructed, and that defendant's counsel was
guilty of prejudicial error in his argument to the jury.

Shortly prior to the accident, which occurred
about 5:00 p.m. September 26, 1947, plaintiff, accompanied
by a girl schoolmate, was pulling a coaster wagon filled
with old paper which the girls were collecting for a school
paper drive. They had been walking north in an alley
between 19th and 20th avenues in Melrose Park, Illinois,
toward Lake street, an east and west concrete paved highway
approximately forty-five feet wide. Their destination was
a school which was located north and east of the place of
the accident. Just where the coaster wagon was located on
Lake street and what portion of defendant's automobile
struck the plaintiff are material facts in dispute.

Plaintiff testified that when she got to the alley exit at Lake street she looked to see if any cars were coming, and the only car she saw was one about a half a block away to the left, so she turned right into Lake street and started walking east along side of cars parked there; that while walking in this manner she was struck on the left side; that she heard no horn or signal of any kind before being struck; that there was ample room to the north of her for an automobile to pass without striking her; that at the time she was hit she was fifteen to twenty feet east of the east line of the alley. Her girl friend, who was holding the papers on the wagon a few feet behind the plaintiff, substantially corroborates the plaintiff's version of the accident. In addition she testified that the plaintiff was pulling the wagon with her right hand and that when the automobile stopped plaintiff was leaning against the right rear wheel.

There were no other eyewitnesses called on behalf of plaintiff, other than defendant, who was called under section 60 of the Civil Practice Act. He testified that his car was in good working order; that Anna Rotolo was riding in the back seat of his car; that the weather conditions were good and it was daylight; that he did not see the girl before the accident; that he was driving ten miles an hour, felt a slight bump and stopped within a foot after he felt the bump; that the girl was standing at the right rear wheel of his automobile; that if the alley were projected, four feet of his car would be in

the line of the alley.

Randolph Goodman was called on behalf of the defendant. He testified that he was walking east along the south side of Lake street just east of the alley when the accident occurred; that he saw the two girls with a wagon; that they passed in front of him going north; that he crossed the alley and heard a cry; that when he looked he saw the right rear wheel of the car had pinned the girl's foot to the pavement; that the car was stopped when he turned around; that there was a small wagon there and the wagon was facing north and the child was in front of the alley; that the automobile was half in front of the alley.

Anna Rotolo, the passenger in the car, testified that when they were "by the alley" she heard a bump at the rear right end of the automobile; that the car stopped and the back of the car "was behind the alley"; that she did not see either of the children before the accident.

From this review of the evidence the contested issue of fact was whether or not plaintiff was proceeding easterly, as she testified, some fifteen feet past the alley when she was struck by the defendant's automobile, or whether she walked into the side of the car as she emerged from the mouth of the alley, too late to be seen by the driver of the automobile. No horn or other signal was given, but if the defendant's testimony is to be believed, there was no occasion or opportunity to sound a warning prior to the accident. While it is true, as

plaintiff argues, that no one who testified on behalf of defendant saw the girl struck, we are of the opinion that the inferences from all the testimony introduced by defendant raised a question of fact as to whether or not the girl was in front of the defendant's car at the time of the accident or whether, emerging from the alley, she stepped into the side of the car. In McMillan v. McLane, 338 Ill. App. 514, the court said at page 516:

"There being substantial evidence to support the verdict of the jury, this court cannot declare the verdict is against the manifest weight of the evidence, merely because there is also substantial evidence to the contrary. The latter must palpably outweigh the former, otherwise this court would be invading the constitutional prerogative of the jury. Bliss v. Knapp, 331 Ill. App. 45. This case falls into the ordinary category of a dispute over facts, and the proper inferences to be drawn therefrom, hence we are not justified in disregarding the jury's verdict. Thirstrop v. Alton & S. R., 335 Ill. App. 1."

Complaint is made that five of the fifteen instructions given at the request of the defendant conclude with the words "not guilty." It is not claimed that any of these instructions incorrectly state the law. While the practice of giving numerous instructions ending with the words "not guilty" has frequently been condemned, the exact number of such instructions which would constitute reversible error cannot be fixed with certainty. We are unable to say that prejudicial error was committed in the number of not guilty instructions given, nor in the giving of other instructions.

We have examined defendant's argument complained of, and, while in certain respects counsel's zeal for his cause led him into improprieties, we are unable to say that the

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argument, considered as a whole and in connection with plaintiff's argument, resulted in prejudicial error.

The judgment of the Circuit Court of Cook County is affirmed.

Judgment affirmed.

Robson and Schwartz, JJ., concur.

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45589

ASSOCIATES DISCOUNT CORPORATION,
a corporation,
(Plaintiff),

Appellee,

v.

BERNICE SCHWARTZ et al.,
(Defendants).

BERNICE SCHWARTZ,
(Defendant),

Appellant.

347 I.A. 74¹

APPEAL FROM

CIRCUIT COURT,

COCK COUNTY.

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE
COURT.

This is an appeal from a decree foreclosing two real estate mortgages and two chattel mortgages executed by defendants, Bernice Schwartz, appellant, and Michael Schwartz, her husband, and two other chattel mortgages executed by the Universal Motors of Chicago, Inc., a corporation (hereinafter referred to as Universal Motors). The mortgages were given as security to plaintiff, Associates Discount Corporation, a corporation, appellee, for two certain joint and several promissory notes executed by defendants. The complaint contains the usual allegations of default and prayer for foreclosure.

Defendants Michael Schwartz and Universal Motors, who did not appeal, filed an answer and counterclaim. Plaintiff filed its reply to the counterclaim denying the allegations.

Defendant Bernice Schwartz, filed her answer and counterclaim denying that there was any consideration on her part for the execution of the notes and mortgages sued

on; claiming that at all times, she was the owner of said property; claiming that her signatures were procured by fraud, duress, coercion, connivance and conspiracy on the part of plaintiff, and asked that said notes be declared illegal and void and the mortgages set aside as a cloud upon the title of the property.

Defendants offered no evidence at the trial. Plaintiff's evidence consisted of the introduction of the notes and mortgages sued on, and testimony which showed that Universal Motors was engaged in the used car business in Chicago, and that plaintiff had loaned it substantial sums of money for the purpose of enabling it to finance the purchase of the used cars. Michael Schwartz was the president and principal stockholder of Universal Motors. Bernice Schwartz was the wife of Michael Schwartz.

The notes secured by the mortgages in question were dated April 2, 1947, for \$70,000, and June 17, 1947, for \$22,950, and were executed by Universal Motors, Bernice Schwartz and Michael Schwartz, to cover shortgages which Universal Motors was unable to pay, and were discovered by plaintiff as a result of an examination of Universal Motors' books. It had drawn drafts secured by trust instruments on nonexistent automobiles and it also sold automobiles on which plaintiff held trust instruments for previous loans and advances without paying off the specific loans in accordance with the agreement of the defendant-debtor.

The master found that on the principal note dated April 2, 1947, the principal sum had been reduced from \$70,000 to \$29,063.29 together with interest from February 2, 1948. On the principal note dated June 17, 1947, for \$22,950, the principal sum had been reduced to \$14,221.13 together with interest from March 2, 1938.

The master filed his revised and supplemental report to which Bernice Schwartz filed objections as follows:

"1. For that the said master in his report and findings does not disclose that the plaintiff proved the material allegations in its complaint.

"2. For that the said master erroneously found that the plaintiff proved that there was a consideration for the execution of certain documents when said consideration was not pleaded by the plaintiff and is not in issue.

"3. For that the master erroneously failed to find that the plaintiff had failed to prove the material allegations in its complaint."

These objections were argued before the chancellor as exceptions. The decree of foreclosure was entered on May 7, 1951, approving the revised and supplemental report of the master and overruling all of the exceptions of defendants.

In addition to the points raised in the objections which were allowed to stand as exceptions to the master's report, Bernice Schwartz for the first time on appeal raises several other grounds for reversal of the decree. In chancery only those objections properly preserved by appropriate objection made to the master's report and

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brought to the attention of the chancellor as exceptions to the report, can properly be considered on appeal.

Cheltenham Improvement Co. v. Whitehead, 128 Ill. 279, 284; Havill v. Darch, 320 Ill. App. 667. We need therefore consider only those points set forth in the objections to the master's report and which were argued as exceptions before the trial court.

As to Bernice Schwartz's exceptions, the facts as heretofore set forth disclose that plaintiff by introducing in evidence the notes, the real estate mortgages and the chattel mortgages involved, made proof of the defaults, and after having made proof of the defaults thereby established a prima facie case in the absence of any evidence by defendants in support of their defense. Foreman Trust & Savings Bank v. Cohn, 342 Ill. 280, 287.

In a suit to foreclose a mortgage where the defense relied upon a lack or failure of consideration, the law is clear that where the uncontradicted evidence was that plaintiff gave a valid and valuable consideration for the notes and mortgages sued on, there is a presumption that a note and mortgage was based upon such consideration and such presumption will prevail unless overcome by evidence to the contrary. First National Bank v. Bennett, 215 Ill. 398, 404. The absence or failure of consideration is a matter of affirmative defense. The burden of proving this defense was upon defendants who asserted it. American National Bank v. Wollard, 342 Ill. 148. Defendants having failed to introduce evidence in support of their conten-

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tentions, therefore the trial court properly overruled the exceptions to the master's report.

At the close of plaintiff's case Bernice Schwartz made a motion for a finding in her favor, which the master denied. Section 64 of the Civil Practice Act (Smith-Hurd Illinois Annotated Statutes Permanent Edition, chap. 110, sec. 188) provides as follows:

"Upon the trial of a proceeding in equity defendant may, at the close of plaintiff's case, move for a finding in his favor or move to dismiss the suit for want of equity. * * * If the decision on such motion is adverse to the defendant he may proceed to adduce evidence, in support of his defense, in which event the motion to dismiss or for a finding shall be deemed to have been waived and withdrawn."

Failure of defendant Bernice Schwartz, who appeared by her counsel to ask the court for the opportunity to offer evidence constituted a waiver of this right and also to object on this ground to the entry of a decree. She cannot now be permitted to raise for the first time an objection on this basis. Whittemore v. Fisher, 132 Ill. 243.

We find no error in the record on the part of the trial court. The judgment is affirmed.

Judgment affirmed.

Tucky, P. J., concurs.

Schwartz, J., took no part.

202 A

45639

THE CHICAGO CLUB, a corporation,)
Appellee,) APPEAL FROM MUNICIPAL
v.) COURT OF CHICAGO.
WADIA BASIL,)
Appellant.) 343 I.A. 74²

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE
COURT.

Plaintiff, The Chicago Club, a corporation, appellee, filed a forcible entry and detainer action in the Municipal Court against defendant, Wadia Basil, appellant. A jury found that plaintiff was entitled to the possession of the premises described in the complaint. Judgment was entered by the trial court on the verdict. The case is before us on appeal from the verdict.

The facts are that plaintiff was the owner of a building in which defendant was a tenant under a lease for a term of three years, commencing May 1, 1946, and expiring April 30, 1949. On April 22, 1949, plaintiff sent a letter by registered mail to defendant informing her that on the expiration of her lease the tenancy was to continue on a month to month basis. The letter acknowledged that defendant had on deposit as security guaranteeing the faithful performance of the lease, \$1,200. The letter enclosed new leases for a month to month tenancy. Defendant did not sign the new leases, nor did she return them to the plaintiff. Defendant continued in possession of the premises paying the regular monthly rental.

On October 15, 1949, plaintiff, by its agent, sent

another letter to defendant and again enclosed copies of leases drawn on a month to month basis, requesting defendant to sign the leases and return them. Defendant did not sign the leases but on November 9 wrote plaintiff explaining that she was delayed in New York and would take care of the matter as soon as she returned. On March 16, 1951, plaintiff wrote defendant informing her that since the expiration of her previous lease on April 30, 1949, she had been a tenant on a month to month basis. The letter further informed her that the month to month tenancy would be terminated as of April 30, 1951. The defendant admitted receiving this letter, as well as a printed thirty-day notice form that was personally served upon her by the plaintiff. Defendant, through her attorney by letter of March 30, 1951, acknowledged the receipt of the plaintiff's letter of March 16. No claim is made in this letter that she was a tenant from year to year. On March 31, 1951, a thirty-day notice of termination of tenancy was served. Subsequently plaintiff filed this action of forcible entry and detainer.

Defendant contends that as a matter of law she was a year to year tenant whose tenancy had never been properly terminated in accordance with the statute, which requires a sixty-days' notice for the termination of a year to year tenancy, and that the jury's verdict and the trial court's judgment thereon was contrary to the evidence.

The record, based on the documentary evidence and the testimony, clearly indicates that the question of

whether or not the defendant was a tenant from year to year, or from month to month, was one of fact to be considered by the jury. The legal presumption of a renewal of tenancy from the holding over of a tenant can be rebutted by proof of a contrary intention on the part of the landlord alone, or of both parties, but not on the part of the tenant alone. Holt v. Chicago Hair Goods Co., 328 Ill. App. 671; Stillo v. Pellettieri, 173 Ill. App. 104.

The jury saw the parties, heard the testimony and had an opportunity to observe their conduct and demeanor while testifying. Under such circumstances this court will not disturb its verdict unless it was against the manifest weight of the evidence or error was committed by the trial court. Such was not the case here. The judgment of the trial court is affirmed.

Judgment affirmed.

Tuohy, P. J., concurs.

Schwartz, J., took no part.

203

45666

HYMEN LITWIN, d/b/a H. LITWIN)
CO.,)
Appellant,)
v.)
PIONEER TRUST & SAVINGS BANK,)
as Trustee under Trust #4074,)
JEAN SOLOWSKI, HENRIETTA)
SOLOWSKI, also known as)
HENRYKA SOLOWSKI, and Unknown)
Owners,)
Appellees.)

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

340 I.A. 75

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE
COURT.

Plaintiff, Hymen Litwin, doing business as H. Litwin Co., filed a complaint to foreclose a mechanic's lien, based upon a contract to construct a basement apartment in the premises at 5158 W. Newport avenue, Chicago, Illinois. The contract was between the plaintiff and Henrietta Solowski, also known as Henryka Solowski, who together with Jean Solowski, defendants, appellees, were beneficiaries of a trust under which the Pioneer Trust & Savings Bank held the title to the premises in trust as trustee.

Plaintiff, in his complaint, alleged that all work was completed in accordance with the contract. Defendants by their answers alleged that the work was not done in a good and workmanlike manner and certain work was not completed within the time set by the contract. They further alleged that pursuant to the terms of the contract plaintiff failed to secure a building permit from the City of Chicago to do said work. Defendants filed a motion for summary judgment, supported by an affidavit executed by their lawyer, in which he alleged that he had made a check

of the records of the Commissioner of Buildings of the City of Chicago and that no building permit was issued to plaintiff, or to anyone, for the work to be done on the premises in question, pursuant to the contract sued on.

The plaintiff filed a motion to strike the affidavit and dismiss the motion for summary judgment stating that issues of fact are raised which cannot be decided by said motion; that the affidavit is executed by counsel for defendants who is a party to the lawsuit; that the affidavit refers to hearsay evidence which would not be admissible upon the trial, together with other allegations which for the purpose of this opinion it is not necessary to set forth.

The trial court heard the argument of counsel and found in favor of the defendants and dismissed the complaint. Plaintiff contends that the trial court erred in dismissing the complaint, and in addition to the grounds set forth in the motion to strike urges that the failure of plaintiff to secure a building permit from the City of Chicago, pursuant to the ordinance, does not make the contract unenforceable.

In the contract there appears in handwriting: "Contractor responsible for perments." In the printed portion there appears: "The owner(s) represent that he is (they are) the owners of the above mentioned premises. To secure building permits and pay for." No question was raised on the motion to strike of the interpretation of the wording "Contractor responsible for perments" but it

is raised in this court for the first time. Plaintiff's agent wrote it in and it takes precedence over the printed portion. We can see no issue of fact. A reading of the contract makes it clear that the parties meant "permits."

As to plaintiff's contention that the affidavit supporting defendants' motion is insufficient because it was executed by counsel for the defendants, Rule 15, Sec. 1 of the Supreme Court provides:

"Affidavits in support of and in opposition to a motion by plaintiff or defendant for summary judgment or decree shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the party relies; shall not consist of conclusions but of such facts as would be admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. If all the facts to be shown are not within the personal knowledge of one person, two or more affidavits shall be used."

While it would have been better to have a third party make the investigation and swear to the affidavit, still it cannot be said that counsel after his investigation did not have knowledge of the facts and could not be sworn as a witness to testify thereto. There is no denial that no building permit was issued and in the absence of any showing to the contrary we must assume that this fact is true. The affidavit states clearly that it is based on an investigation made by the affiant of the records of the Commissioner of Buildings of the City of Chicago, and that no building permit was issued during the year 1950 for any type of work on the premises in question, and more specifically that no building permit was issued to the plaintiff,

Hymen Litwin, doing business as H. Litwin Co., Chicago, Illinois. This statement is sufficient to satisfy the foregoing rule and is a defense alleged in answer to plaintiff's complaint.

The pertinent parts of chap. 43 of the Municipal Code of Chicago, which relates to building permits, provides in part as follows:

"Section 1: It shall be unlawful to proceed with the erection, enlargement, alteration, repair, removal or demolition of any building, structure or structural part thereof within the city unless a permit therefore shall have first been obtained from the Commissioner of Buildings.

"Section 11: No person shall begin any work for which a building permit is required or any work of excavation in preparation therefore until the permit has been obtained. If any person violates this section, the Commissioner of Buildings shall order the work stopped at once and enforce that order in addition to the penalty for the violation.

"Section 38: Any person violating, or resisting or opposing the enforcement of any provisions of this chapter, where no other penalty is provided, shall be fined not more than \$200.00 for each offense. Each day such violation shall continue shall constitute a separate and distinct offense; * * *."

The ordinance in question is clear and understandable. It makes it unlawful for any person to commence any work without obtaining a permit therefor from the Commissioner of Buildings. In Bairstow v. Northwestern University, 287 Ill. App. 424, this court held that the failure to obtain a permit from the City of Evanston to do excavating work, precluded the enforcement of a mechanic's lien against the defendant for such work. The ordinance of the City of Evanston was similar to the one in question except it did not include as a part of the ordinance a penalty

provision. It referred to the subject of general penalties for violations of the building code. Cited with approval in this case is William H. Brown & Company v. John F. Owens et al., 248 Ill. App. 661, and Miller v. Ammon, 145 U.S. 421.

Plaintiff attempts to distinguish this case from Bairstow v. Northwestern University on the basis that because the city ordinance provides for a penalty, this is in lieu of making the contract unenforceable. We cannot agree with this contention. It is our opinion that the fine provided for in the city ordinance is an additional penalty for failure to comply. To hold otherwise would be to allow plaintiff to elect to pay such penalty as the court may assess and avoid compliance with the ordinance. This would ultimately lead to a breakdown of the building code and would result in contractors setting their own standards of compliance rather than meeting the standards set by the code which are for the protection of the general public.

Plaintiff's failure to obtain a building permit pursuant to the ordinance in question made his contract unenforceable. The order of the trial court is affirmed.

Order affirmed.

Tucky, P. J., concurs.

Schwartz, J., took no part.

45555

A 347 I.A. 761

JAMES T. B. SCOTT, administrator
of the estate of ALEXANDER
MacDOUGALL, deceased,
Plaintiff-Appellee,
v.
CHICAGO TRANSIT AUTHORITY,
a municipal corporation,
Defendant-Appellant.

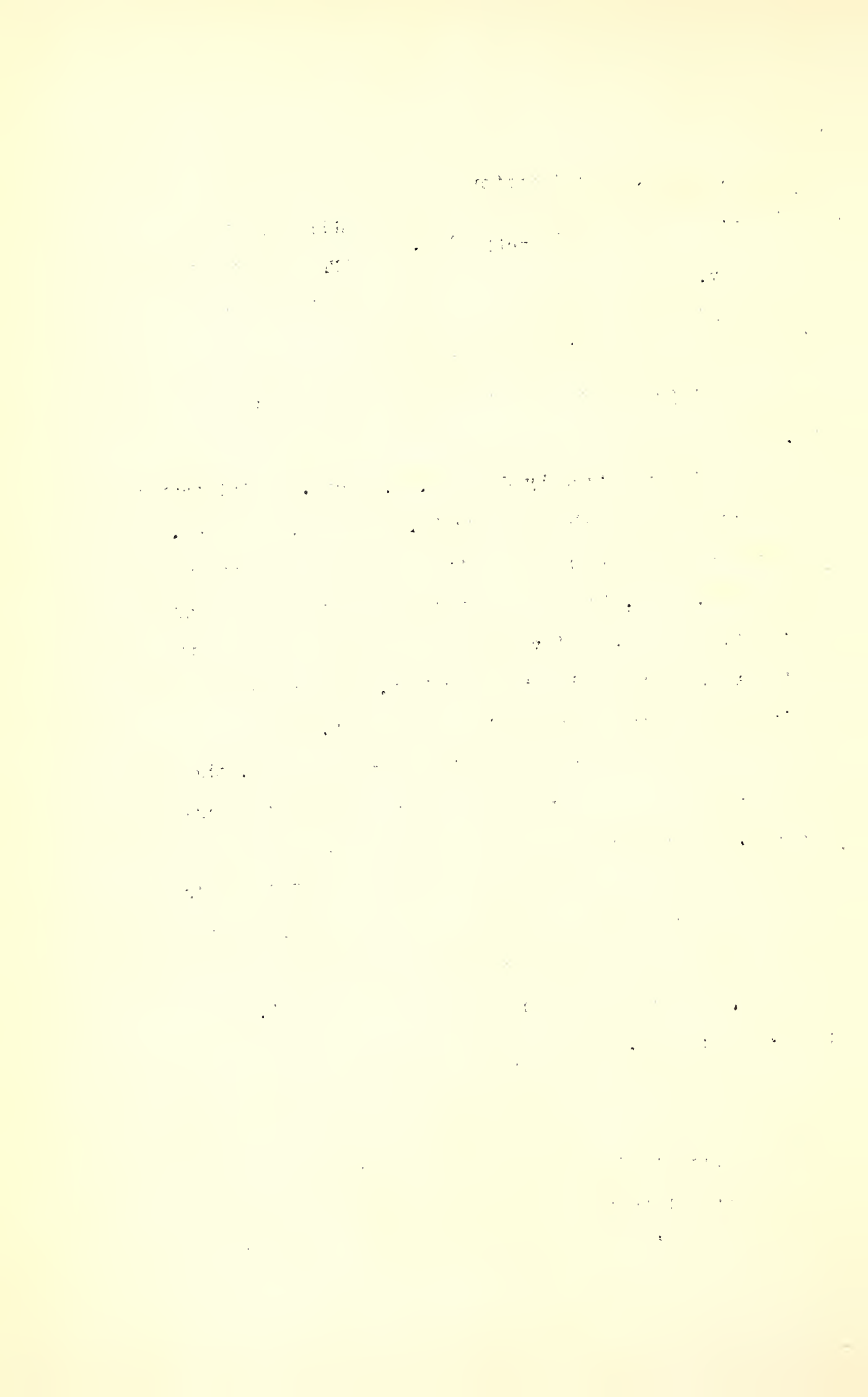
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) APPEAL FROM
)
) SUPERIOR COURT,
)
) COOK COUNTY.
)
)
)

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE
COURT.

This is an action by James T. B. Scott, administrator
of the estate of Alexander MacDougall, deceased, appellee,
growing out of an accident which took place on the afternoon
of November 2, 1944, in the vicinity of Ashland avenue and
42nd street, Chicago, Illinois, when the deceased was struck
by a streetcar operated by the defendant, Chicago Transit
Authority, a municipal corporation, appellant.

The case has been tried twice. In May, 1948, the
jury rendered a verdict for plaintiff and the court granted
defendant's motion for a new trial. In the second trial the
jury returned a verdict of guilty and assessed plaintiff's
damages at the sum of \$8,500. The court entered judgment on
the verdict. Defendant's motions for judgment notwithstanding
the verdict, and in the alternative for a new trial, were
denied and overruled.

It is plaintiff's theory that the deceased was cross-
ing from east to west over Ashland avenue in the south cross-
walk of 42nd street with a green or go light in his favor,
at a time when defendant's streetcar was traveling south on
Ashland avenue against the light, and as a result of the



negligent operation of the streetcar, under those circumstances, the deceased was struck, injured and died.

It is defendant's theory that deceased had come from the west sidewalk of Ashland avenue, at a point about 70 or more feet south of the south crosswalk of 42nd street onto the southbound safety island, which was located at that place, stopped on the safety island for a moment at about the center of it, and then, at a time when the streetcar was passing south at the north half of the safety island, stepped in front of it in an attempt to cross over Ashland avenue at that point, west to east, when the streetcar was five or six feet from him, and in that manner was struck by the streetcar, receiving injuries that resulted in his death.

Defendant asserts (1) that the verdict was against the manifest weight of the evidence; (2) that there was error in the rulings on the admission of evidence with reference to the comments and statements of counsel relating thereto, and in the manner of the cross-examination of witnesses; and (3) that there was error in the giving of instructions.

As to defendant's first contention that the verdict was against the manifest weight of the evidence, three witnesses testified for the plaintiff, two of whom were eyewitnesses to the accident. Ten witnesses testified for the defendant, four of whom were eyewitnesses to the occurrence. In this type of an accident where the events take place within a few seconds, there is always a conflict in the testimony of witnesses. Bernard Wagner, who testified for

[illegible]

plaintiff, said that he and Kenneth Leach were standing on the southwest corner of the intersection of 42nd street and Ashland avenue when the accident happened. He saw the streetcar passing up the safety island and hit the deceased. The deceased was crossing on the green light from the east to the west side of the street in the south crosswalk at the time of the occurrence. He was at the middle of the street when he first saw him. When the streetcar struck the deceased it was going about 15 to 20 miles per hour, and traveled from that point in the south crosswalk through the crowd to the other end of the safety island, where he saw the deceased lying under the streetcar.

Kenneth Leach, plaintiff's other eyewitness, did not testify at the first trial. Bernard Wagner said at the first trial he was accompanied by a friend named Benny. Defendant has made a point of the fact that Leach's name is not Benny. However, Wagner on the second trial said that it was Kenny who was with him. The witness said he was known as Kenny. There is not a great deal of difference between the names Kenny and Benny and it could have been a mistake on the part of Bernard Wagner. His testimony was substantially the same as that of Bernard Wagner except that he stated they had reached the south curb at the time the accident occurred. There is an inference raised by the defendant that Leach had never seen the deceased before he saw him under the streetcar. An examination of the record indicates to the contrary--that he said he saw him crossing

the street when the light was green for east and west and that he saw him struck by the streetcar and then saw him under the streetcar after the accident.

Defendant's eyewitnesses were four in number. The motorman, Albert Manske; an off-duty streetcar conductor, John Krusynski, who was riding on the streetcar behind the motorman; a streetcar passenger, Anna Prosper, and Albert K. Crum, a disinterested witness who was standing on the safety island. In substance, they testified that the deceased was crossing from west to east and had come onto the southbound safety island. The streetcar, which was going south, had come to a stop at 42nd street for the red light. When the light turned to green the streetcar proceeded across. When it was about halfway down the safety island and five to eight feet from the deceased, he stepped out in front of the streetcar. The point of impact was about 60 to 70 feet from the crosswalk. Circumstances tending to corroborate the substance of defendant's version were testified to by the conductor of the streetcar, two firemen and a policeman. There were certain points of discrepancy in the testimony of plaintiff's witnesses and defendant's witnesses. However, we do not deem them of sufficient import to require a discussion.

The number of witnesses testifying for the respective parties, while a factor, cannot be said to be controlling. Miller v. Green, 345 Ill. App. 255. A court of review should not set aside a verdict where the evidence conflicts

...continued from page 10

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even though the apparent weight of the evidence impresses the court as being in favor of the unsuccessful party.

Silberman v. Washington National Insurance Co., 329 Ill. App. 448.

The fact that two juries saw and heard the witnesses and found for the plaintiff cannot be passed over lightly. Both weighed the evidence, considered what witnesses could be believed and what witnesses could not be believed and each time found for the plaintiff. The issues were clearly drawn. The testimony of the plaintiff's witnesses supported one set of facts and the testimony of defendant's witnesses supported a contrary set of facts. The juries apparently believed plaintiff's witnesses. The trial judge who heard and saw the witnesses, approved the verdict by his denial of plaintiff's motion for a new trial. When the testimony is contradictory this court will not substitute its judgment as to the credibility of witnesses for that of the trial court which saw and heard them. Wynekoop v. Wynekoop, 407 Ill. 219. We have weighed all these factors and we are of the opinion it would be unduly presumptive on our part to say that the verdict was against the manifest weight of the evidence. ✓

Defendant contends that there is no showing that decedent was exercising due care when he started crossing the street. It is true that the plaintiff's witnesses did not state that the light was green when he started to cross but both Wagner and Leach testified that immediately before

the accident the lights were green and that the streetcar had crossed on the red light. Defendant's contention is very technical. In these days of crowded streets and traffic difficulties the way of the pedestrian is at best difficult and dangerous. If the decedent was observed crossing on the green light, we must presume that he entered the crossing on the green light. Doing so and being observed crossing on the green light, he must be assumed to have the right of way until he reached the opposite side of the street. Mahan v. Richardson, 284 Ill. App. 493; Cahill v. Cummings, 322 Ill. App. 662.

Plaintiff asked certain leading questions of the witness Leach, which were sustained by the court. These questions were repeated on several occasions and again sustained. Defendant contends that the reason for the leading questions was to suggest to the witness answers which were desired and later elicited on subsequent interrogation and that this line of leading questions and the answers that later resulted were extremely prejudicial to the defendant in that it gave the witness an opportunity to change his initial version of how the accident occurred. We have examined the transcript and while we believe that there is some question as to the propriety of the examination by counsel for the plaintiff, we do not believe that it was so prejudicial as to be ground for reversal. In the same class are defendant's further contentions that there were improper attempts to impeach and use unsworn

1. The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations

which are satisfied by the functions $u_i(x, y, z)$ and $v_i(x, y, z)$ in the domain D of the space E_3 bounded by the surface S .

It is shown that the system of equations is solvable in the domain D if and only if the functions $f_i(x, y, z)$ and $g_i(x, y, z)$ satisfy certain conditions.

2. In the second part of the paper the problem of the construction of the solutions of the system of equations is solved by the method of successive approximations.

It is shown that the solutions of the system of equations can be represented in the form of a series in powers of the functions $f_i(x, y, z)$ and $g_i(x, y, z)$.

3. In the third part of the paper the problem of the construction of the solutions of the system of equations is solved by the method of integral equations.

It is shown that the solutions of the system of equations can be represented in the form of an integral equation.

4. In the fourth part of the paper the problem of the construction of the solutions of the system of equations is solved by the method of the Green's function.

It is shown that the solutions of the system of equations can be represented in the form of a series in powers of the functions $f_i(x, y, z)$ and $g_i(x, y, z)$.

5. In the fifth part of the paper the problem of the construction of the solutions of the system of equations is solved by the method of the variation of parameters.

statements and immaterial documents. We realize that it is difficult for the trial court at all times to restrain the zeal of counsel and confine the examination within strictly legitimate bounds. We do not believe, however, that there was a calculated plan to sway the jury by immaterial questions and offers of immaterial evidence.

Finally, defendant contends that the court erred and committed reversible error in giving the following instruction:

"The jury is instructed that if you believe, from the evidence, that the deceased, Alexander MacDougall, was crossing 42nd Street in the crosswalk at a time when the light was green for him, then the deceased, Alexander MacDougall, had the right of way and it was the duty of the defendant to yield the right of way to the deceased."

Defendant says that it is clearly directory in nature as to the primary, ultimate and real issue involved in this case. Under the theory of fact as to who had the right of way under the stop light statute, if this instruction were to stand alone and other instructions were not given by defendant, it might be considered reversible error. However, defendant's instructions 9 and 10 tell the jury that if the deceased by the exercise of ordinary and reasonable care could have avoided the accident, plaintiff could not recover. Defendant's instruction No. 18 told the jury that they could not compare the negligence of the deceased and the defendant and then directed that if the deceased was guilty of any want of ordinary care which caused or proximately contributed to the cause of the injury then they should find the defendant not guilty. We believe that the giving of these instruc-

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tions by the defendant rendered plaintiff's instruction innocuous and the giving of it was not such error as would require a reversal.

The judgment of the trial court is affirmed.

Judgment affirmed.

Tuohy, P. J., and Schwartz, J., concur.

45561

347 I.A. 76²

LEO BERKOWITZ and FRIEDA)	
BERKOWITZ,	)	APPEAL FROM MUNICIPAL
)	
Appellants,	)	COURT OF CHICAGO.
)	
v.)	
)	
ADOLPH GLICKMAN,)	
)	
Appellee.)	

MR. JUSTICE SCHWAPITZ DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order entered April 25, 1951, vacating a judgment for possession in a forcible entry and detainer suit entered December 13, 1950. It is apparent from the record that the judgment was entered by agreement of the parties and upon their stipulation that the writ of restitution would be stayed until July 1, 1951. The claim was made that this was done upon misrepresentation by plaintiffs. The evidence does not support this claim and there is nothing in the record to warrant vacation of this judgment after expiration of the term period of thirty days. Rules with respect to the vacation after term time of judgments entered by consent of the parties have been frequently set forth by this court, notably in Lefor v. Jones, 338 Ill. App. 173; Schmahl v. Aurora National Bank, 311 Ill. App. 228; Dunlap v. Horton, 337 Ill. App. 106.

The order of vacation appealed from is reversed and the cause remanded with directions to deny the petition to vacate and to permit the original judgment for possession in favor of plaintiffs to stand.

Judgment reversed and cause
remanded with directions.

Tuohy, P.J., and Robson, J., concur.

1907

THE UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

WATER RESOURCES DIVISION
WASHINGTON, D. C.

REPORT OF THE
COMMISSIONER OF LANDS AND MINES

ON THE
LANDS OF THE UNITED STATES

IN THE
YEAR 1907

BY
J. M. SMITH

CHIEF OF BUREAU

WASHINGTON, D. C.

1908

THE UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

WATER RESOURCES DIVISION
WASHINGTON, D. C.

REPORT OF THE
COMMISSIONER OF LANDS AND MINES

ON THE
LANDS OF THE UNITED STATES

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

February Term, A. D. 1952

Term No. 52 F 15

Agenda No. 11

T. W. CARROLL,)
)
Plaintiff-Appellee,)
)
vs.) Appeal from the
) Circuit Court of
N. A. CUMMINGS, JOHN COLLIS,) Jefferson County.
and WHITE RIVER DRILLING)
COMPANY, a Corporation,)
)
Defendants,)
)
N. A. CUMMINGS,)
)
Appellant.)

347 I.A. 77¹

CULBERTSON, P.J.

This is an appeal by Appellant,
N. A. CUMMINGS (hereinafter called defendant
Cummings), from a judgment of the Circuit Court
of Jefferson County upholding the finding of a
Master-in-Chancery that defendant Cummings, aside
from liability imposed upon the corporate defendant
in the case (which is not appealing), individually,
was indebted to Appellee, T. W. CARROLL (herein-
after called plaintiff) in the sum of \$3608.64.

The contention is made in this Court
that the finding of the Master and the judgment of

the Circuit Court were contrary to the manifest weight of the evidence, and that the evidence disclosed only an indebtedness of the defendant corporation, White River Drilling Company, and a counter-balancing claim of White River Drilling Company as against plaintiff Carroll, and that any connection of the defendant Cummings with the transaction was solely in the capacity of said defendant as president of White River Drilling Company, acting on behalf of said corporation and not for himself, individually. The Court below had also dismissed the counter-claim of the corporation as against plaintiff Carroll.

This action was instituted on behalf of plaintiff Carroll as against defendant Cummings and another individual defendant, and White River Drilling Company, for certain services performed pursuant to oral agreements. The evidence disclosed that defendant Cummings was one of the major stockholders of the corporation, and was the owner of a drilling rig, etc. The evidence showed that defendant Cummings employed plaintiff Carroll to "set on wells" as a geologist, for a certain consideration, and to work on certain productive wells at a certain figure per well. The services were performed by plaintiff Carroll. The evidence indicates that he did not have any knowledge that White River Drilling Company was organized as a corporation. Services

had been performed for defendant Cummings personally, prior to the making of a final agreement, although there was evidence of payment with Company check, there was also substantial evidence in the record that these services were performed for the benefit of and at the insistence of defendant Cummings.

The Master heard all the evidence in this cause and made his findings and conclusions after due consideration of such evidence. In view of the fact that the Master had heard the oral testimony and that the findings of the Master had been sustained by the Trial Court, this Court cannot disturb such findings and conclusions, unless they were clearly and manifestly against the weight of the evidence (KUZLIK vs. KWASNY, 383 Ill. 354; ZETA BUILDING CORPORATION vs. GARST, 408 Ill. 519.)

After a careful review of the entire record in this cause it is obvious that the conclusions of the Master-in-Chancery, as approved by the Trial Court, were not against the weight of the evidence. The judgment of the Circuit Court of Jefferson County will, therefore, be affirmed.

Judgment affirmed.

Bardens, J., Scheineman, J., concur.

(Abstract)

FILED

MAY 1 1952

David J. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

APPELLATE COURT
STATE OF ILLINOIS
FOURTH DISTRICT

2783 A

February Term, A. D. 1952

Term No. 52-F-11.

Agenda No. 8.

IRENE STARNES,

Plaintiff-Appellant,

-v-

LOUIS POSTAWKO, Doing Business as
"GREEN HALL,"

Defendant-Appellee.

Appeal from the
Circuit Court of
Madison County.

347 I.A. 782

Bardens, J.

On December 12 and 13, 1947, defend-
ant operated a tavern known as "Green Hall" on rent-
ed property situated on the north west corner of
Eighth and Washington avenues in the city of Madison,
Illinois. Leading up to the entrance door of the tavern
were three concrete steps, each of which was approxi-
mately eight inches in height.

Plaintiff alleged in her complaint that
in the early morning of December 13, 1947, she was
an invitee of the defendant at his tavern and that it
became his duty to keep the concrete steps leading
thereto in a safe condition for the use of the invited
public, including plaintiff; that defendant permitted
and allowed snow, ice, and other slippery material to
remain on said steps, thus rendering them dangerous

to walk on; that defendant knew, or in the exercise of due care should have known, of their condition; that plaintiff did not have equal knowledge of the dangerous condition and was not warned thereof; that plaintiff, in leaving the premises early on that morning, slipped and fell and became injured while in the exercise of due care for her own safety. Defendant answered, denying the charges of negligence and due care.

Trial was had before a jury, resulting in a verdict in plaintiff's favor. At the close of all the evidence the defendant tendered a motion for a directed verdict upon which the court reserved ruling. After verdict the court granted this motion and entered judgment for the defendant notwithstanding the verdict. Plaintiff appeals from this judgment.

The evidence brought out that plaintiff, on the dates mentioned and prior thereto, was an employee of the defendant as a waitress at the tables and behind the bar. On the afternoon of December 12 she came to work about five P. M., at which time it was light and she could see that it was then and had been snowing. There was snow on the ground and snow and ice on the steps. She told defendant of the condition of the steps and that the same should be swept, after which, according to her testimony, defendant went out the front door with a broom. Plaintiff worked until about one A.M., at which time she was then invited to remain and have some drinks with a customer who was in the tavern. This customer was a truck driver and had agreed to drive

plaintiff home. Plaintiff had three highballs, one of which she bought herself, and about one-half to a quarter of an hour before closing time she started home with the man who had invited her to have some drinks. As she prepared to leave she noticed the snow, but testified she had not otherwise observed the weather conditions. It was the custom in the tavern to turn off the outside neon sign about a quarter of an hour before closing time and plaintiff knew of this custom and at the time she prepared to depart the outside neon sign was turned off. Plaintiff herself turned off the ceiling lights and the dance hall lights, thus the only remaining lights left on when she prepared to depart were the neon light around the bar and the night light back of the bar. Her companion went out the door first and plaintiff followed; she stood on the top step facing the door while she closed it; she then turned around and took a step down to the second step when her right foot slipped and she fell, striking her back on the third step. Plaintiff testified that she saw ice and snow on the steps immediately after she fell. There was no hand rail on the steps.

In seeking to sustain the judgment of the lower court, the defendant insists that the plaintiff wholly failed to prove due care on her part. There can be no question but what plaintiff was an invitee. However, even though she was an invitee, she possessed certain knowledge that an ordinary patron would not. Having been an employee of the defendant, she was familiar with all the surrounding circumstances concerning the entrance way. She was fully aware when

she came to work in the late afternoon that there was snow and ice on the steps and it had been so impressed upon her mind that she mentioned this fact to defendant and admonished him that they should be swept. Plaintiff was familiar with the custom of turning the outside lights off prior to closing time and had turned out the ceiling lights herself and was thus fully aware of the lighting conditions at the steps when she departed. She could see snow and ice on the steps immediately after she fell and the conclusion is inescapable that she could have seen the snow and ice immediately before she fell. She stepped safely on the first step and faced the door of the tavern in order to close the same and if there was snow and ice on the steps at that time, she must have been fully aware of that fact. After closing the door, she turned around on the top step and started down and by her own testimony she "Did not look on the steps before I went down. I just stepped down." It is common knowledge that the two or three drinks she had had within the hour would slow her reflex reactions. Plaintiff did not charge in her complaint that defendant was negligent in failing to provide a hand rail and, of course, as an employee she had full knowledge of the fact that the steps were not provided with one. She testified that she had on low heel shoes.

The plaintiff had the burden of proof as to her due care. She was chargeable with knowledge of the conditions that existed. The evidence seems wholly lacking as to any precautions taken by her in the light of that knowledge, but on the contrary shows she stepped

down without even looking at the steps. Under these circumstances we feel the lower court was justified in allowing the motion for a directed verdict and entering judgment notwithstanding the verdict.

Judgment affirmed.

Publish abstract only.

Culbertson, P. J., and Scheineman, J., Concur.

FILED

MAY 2 1952

David J. Mallitt

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

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Agenda No. 9.

34 LA. 78

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Appeal from the
Circuit Court of
Marion County,
Illinois.

;) ; ; ; ; ;

Defendants-Appellees.

Honorable F. R. Dove, Trial Judge.

This case was in our court previously. At that time we remanded the case for a new trial and set out specifically the interpretation of the contract between the parties and the burden of proof upon the plaintiff. (See 341 Ill. App. 468) The facts necessary to show the controversy between the parties were set out in that opinion and will not be repeated in this. Thereafter the case was reinstated and tried before the chancellor, at the conclusion of which he took the case under advisement for briefs. Thereafter he rendered his decision and decree was entered allowing the plaintiff the full amount to be paid under the original

contract and allowing a sum of \$370.00 for additional bathroom fixtures, for an addition to the size of the utility room and for new sinks in the downstairs kitchen, plus a sum of \$37.00 for a supervisory fee. This made the total amount due and owing the plaintiff the sum of \$6,907.00, upon which the defendants have paid \$4,500.00, and the decree gave the plaintiff a lien for the balance of \$2,407.00.

Plaintiff appeals from the decree insisting in substance that the lower court did not allow sufficient of the claimed extras. The plaintiff was claiming extras of approximately eleven items which, together with the supervisory fee, totaled over \$2,200.00.

Plaintiff argues that the manifest weight of the evidence sustains his claim for all of these additional extras and that, therefore, the lower court erred in allowing only \$370.00. We have carefully reviewed the abstract of record and some portions of the original record and we are of the opinion that the decree of the lower court was fully sustained by the evidence and was not contrary to the manifest weight of the evidence. While there was substantial proof that work and materials, claimed as extras, were furnished, the evidence to show they were extras and agreed upon by the parties was either lacking or contradicted. The question of allowance therefore became clearly one for the trier of the facts.

Plaintiff also contends that the court committed error in admitting into evidence Defendants'

Exhibit No. 1, being the written proposal of the plaintiff to do the original job for a sum of \$6,500.00 or less. In our previous opinion we treated of this written proposal and held that it, together with other documents and oral evidence, constituted a contract between the parties. The plaintiff himself relies upon this document to sustain his claim for \$6,500.00 which was to cover the original contract and which sum was allowed to him in full by the lower court. There was no error in admitting this exhibit into evidence.

Lastly, plaintiff contends that the decree of the court below is contrary to law for the reason that the decree failed to include interest in accordance with Sec. 1, Chap. 82, Ill. Rev. Stat., 1948. ✓ The statute does contemplate that a contractor who is entitled to a mechanics' lien shall be allowed interest. The court found, however, that a tender of \$2,000.00 had been made and no exception or objection having been taken to this finding, it is binding on us. Interest should have been allowed on the excess over \$2,000.00. The decree of the lower court is modified, therefore, by adding the wording "with five per cent (5%) interest on the sum of \$407.00 from the 24th day of September, 1948," following the wording "Two Thousand Four Hundred Seven (\$2,407.00) Dollars" in the next to last paragraph of the decree. The decree, so modified, is affirmed.

Decree modified and affirmed.

Publish abstract only.

Culbertson, P. J., and Scheineman, J., Concur

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MAY 2 1952

David J. Mallitt
CLERK OF THE APPELLATE COURT
DISTRICT OF ILLINOIS

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No. 52-F-3

In The

APPELLATE COURT OF ILLINOIS

Fourth District

October Term, A. D. 1951

347 I.A. 78²

GORDON A. COOMBS,)
Plaintiff-Appellant,)

vs.

BOARD OF FIRE AND POLICE)
COMMISSIONERS OF THE)
CITY OF EAST ST. LOUIS,)
ILLINOIS,)
Defendant-Appellee.)

) Appeal from the
) Circuit Court of
) St. Clair County,
) Illinois.

Honorable Ralph L. Maxwell, Judge Presiding

Scheineman, J.

Gordon A. Coombs was discharged from the East St. Louis Fire Department, after a hearing before the Board of Commissioners, and the order was affirmed on administrative review, by the Circuit Court, from which he has perfected this appeal. He contends the decision is contrary to the manifest weight of evidence, and asserts various defects in legal procedure.

The charge on which the board acted was that Coombs had used insulting and profane language toward his superior officer and was guilty of insubordination.

So far as weight of evidence is concerned, the testimony consisted of statements by the superior

officer, largely denied by Coombs. The result was simply a question of which should be believed, and the decision of the trier of facts in that respect is not to be disturbed by this court, there being no basis to assert that Coombs' testimony was entitled to greater weight.

In fact, on cross-examination, Coombs admitted use of obscene and insulting language, which he defended on two grounds: that his superior started it (which was denied) and that it was customary language in the fire station, which we regard as irrelevant, and testimony to such effect was properly excluded.

Appellant also contends the incident should not be regarded as a sufficient basis for discharge of an employee, that it was merely a "clash of personalities." The words which the employee used are unfit for publication, but they were so rude and insulting that no self-respecting superior could be expected to ignore them. Coombs apparently was intimating that his superior would like to cause his discharge, and possibly thought this could not be accomplished. The incident was not a mere discourtesy, but disclosed a contumacious attitude which the board could properly find rendered Coombs' continued employment detrimental to the discipline or efficiency of the service. That is a proper ground for discharge. *Bloomquist v. Rehnberg*, 280 Ill. App. 1. The evidence in this case was sufficient to establish conduct which would not be tolerated in any organization purporting to main-

tain reasonable discipline.

Appellant contends the notice of hearing which was served on him was defective in form, in that the charges against him were stated only in general terms, and failed to set forth the precise words he was charged with using. The notice set forth the time and place of the incident, and its general nature. This was sufficient. It is not required that the nature of the charge be in technical language required in an indictment.

Complaint is also made that the chief of the department wrote a letter to Coombs stating the charges against him in somewhat different terms than those used in the notice served by the secretary of the board. We have examined the two documents and find no basis for the claim that he could not understand what was charged. He appeared before the board, where he was represented by counsel, and the transcript plainly shows the charges were fully understood.

Appellant says he was called upon to answer the charges under oath, which amounted to unlawfully requiring him to testify against himself. This is somewhat inconsistent with his denials on the hearing, since it intimates that if he told the truth, he would be admitting his guilt. Of course, the objection is without merit, Coombs was not being tried for any crime or misdemeanor. This was an investigation by the board, civil in nature, where a party may be called upon to tell the truth under oath, as in other civil proceedings. No

claim of privilege was made and the point is not before us.

Several other points are argued in appellant's brief but we find no error in the proceedings before the board or in the trial court, and the judgment is affirmed.

Judgment Affirmed.

Publish Abstract Only.

Culbertson, P. J., and Bardens, J., Concur.

FILED

MAY 2 1952

David J. Mallitt

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

No. 52-F-13

In The

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

February Term, A. D. 1952

REUBEN DEVER,

Plaintiff-Appellee,

vs.

JAMES C. DUNLAP,

Defendant-Appellant.)

347 I.A. 79

) Appeal from the
) Circuit Court of
) Alexander County,
) Illinois
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Honorable Harold L. Zimmerman, Judge Presiding

Scheineman, J.

The plaintiff, Reuben Dever, is a licensed real estate broker. The defendant, James C. Dunlap, listed certain property with the broker for sale, the price specified being \$5500.00. It is undisputed that the broker produced a buyer, a Mrs. Reid, who was ready, willing and able to purchase at the price named.

Defendant refused to go through with the deal and this suit was brought for plaintiff's commission. He recovered a judgment for \$275.00 before the court without a jury. This is 5% of the price, and is the usual and customary broker's commission in the locality.

While some side issues were introduced in evidence, the only dispute on a relevant issue was over the nature of the listing with reference to charging a commission. The only witnesses on this issue were the

plaintiff for his side, and the defendant for his side.

The plaintiff testified that defendant asked him to list his property for sale, but at first plaintiff refused, because of a previous experience with defendant. Later he undertook to attempt to sell it, and inquired for a price, which was then named at \$5500 with no mention of commissions. According to plaintiff, there was never anything said about the price being net, or about commissions, until defendant refused to close the deal.

Defendant testified that plaintiff first declined to list the place, and later offered to do so, that the price was fixed at \$5500, that Mrs. Reid was shown the place during defendant's absence, that plaintiff called him to sign the papers, and at that time there was some discussion about a defect in title. Defendant testifies he then said he would have to have \$5500 out of the place, that plaintiff said his commission would be deducted, and defendant then stated he would not pay any commission. On cross-examination, defendant modified his direct testimony, by the assertion that when he first named the price he said "\$5500 for my part." He admitted that he knew plaintiff was a real estate broker, and also knew brokers customarily charged for their services.

Where the evidence is conflicting, the trial judge, who saw and heard the witnesses, had advantages not possessed by a court of review in determining the credibility of the testimony, and his findings will not be disturbed unless clearly and palpably erroneous.

Whether there exists a contract with a broker, seeking to recover commissions, and the terms thereof, are questions of fact for a jury.

Purgett v. Weinrank, 219 Ill. App. 28; Frankenstein & Co. v. Adams & Austin Bldg. Corp., 325 Ill. App., 574; Theis v. Itterman, 329 Ill. App., 512. In this case the trial judge takes the place of the jury.

There is evidence that, after Mrs. Reid had been shown the property, and defendant was asked to sign papers, he first tried to avoid the deal by referring to some defect in his title. When plaintiff assured him this could be cured, defendant for the first time brought up the point there was to be no commission charged him. Defendant's counsel stresses the testimony that his client previously told the broker the named price was "for my part." As above indicated, this testimony could be an afterthought. ✓

We are of the opinion that the trial court was fully justified in finding the facts in favor of plaintiff, and that, in listing the property without inquiring about commissions, and without naming any conditions, the defendant impliedly agreed to pay the usual and customary commission, since he knew or had reason to believe the plaintiff expected to be paid for his services. Knotts v. Lake Shore R. Co., 172 Ill. App., 550; Kinder v. Pope, 106 Mo. App. 536, 80 SW 315.

The appellant seeks to avoid liability upon the ground that the prospective purchaser ought to

pay the commission, and in the alternative, that plaintiff was acting for both parties and should be denied compensation. In our opinion the evidence plainly indicates that plaintiff made no charge to Mrs. Reid, and did not expect to do so, and she was not employing him as her agent. Also, all the testimony on the subject indicates that plaintiff faithfully represented the defendant, and there is nothing to show any attempt to represent adverse interests. As plaintiff testified, he simply took her name as a prospective purchaser, and in order to make sales, he had to have purchasers.

The errors assigned are without basis, and the judgment is affirmed.

Judgment Affirmed.

Culbertson, P. J., and Bardens, J., concur.

Publish Abstract Only.

FILED
MAY 2 1952

David J. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

45554

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J. P. BRENNER,

Appellee,

v.

VILLAGE OF PHOENIX, a municipal corporation, Bernard Smuczynski, President of the Board of Trustees of the Village of Phoenix, a municipal corporation, John Pacyga, Walter Rachuna, Frank Michor, Joseph Liss, Joseph Novotny and Edward Kempa, members of and constituting the Board of Trustees of the Village of Phoenix, a municipal corporation, John Falica, Village Clerk of the Village of Phoenix, a municipal corporation, and Frank Pala, Village Treasurer of the Village of Phoenix, a municipal corporation,
Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

347 I.A. 1771

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Joseph P. Brenner filed a complaint in mandamus against the Village of Phoenix, a municipal corporation, and its trustees, to force issuance and delivery to him of general obligation bonds of the Village in an amount sufficient to pay a judgment entered in the Circuit Court of Cook County on December 13, 1949, for \$61,441.64, together with costs and accrued interest. Defendants' answer admits the factual allegations of the complaint, but denies that it is the duty of the Village to issue the bonds. Hence, defendants admit that plaintiff is the holder of the judgment; that it remains due and unpaid; that since the entry thereof plaintiff's several requests for payment have been refused; and that defendants have not suggested any method of making payment. Defendants do not deny that

plaintiff is willing to accept general obligation bonds of the Village in satisfaction of the judgment in the event the bonds are not salable.

Plaintiff moved for judgment on the pleadings, pointing out that the answer admits all the allegations of the complaint except the duty of the defendants to issue the bonds. The court ordered that the answer stand as an answer to the motion for judgment. The court entered judgment that a writ of mandamus issue directed to the Village and its officials, commanding them to adopt an ordinance providing for the issuance of general obligation bonds of the Village in valid and legally binding form, bearing interest at the rate of 4% per annum, in an amount sufficient to pay the principal of the judgment, together with all interest thereon and the costs of that suit, and to take requisite steps to perform all acts necessary to make the bonds so to be issued the legal and binding obligations of the Village, and to levy taxes upon all taxable property within the Village to pay the principal and interest of the bonds as the same falls due, to sell the bonds at not less than par plus accrued interest, and to pay to plaintiff the proceeds of the sale of the bonds or so much thereof as may be required to pay the judgment, interest and costs, or in the alternative, should the bonds not be sold by the Village within 30 days, that they be delivered to plaintiff upon the condition that they be accepted in full satisfaction of his judgment, and that he recover of and from defendants his reasonable costs. Defendants, appealing, ask that the judgment be reversed.

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Defendants maintain that mandamus does not lie to compel the exercise of a duty in a particular manner where the party sought to be coerced is clothed by law with discretion to use one or more methods of performing the duty, and point out that the statutes provide at least four methods by which a municipality may legally raise funds to pay a judgment. They admit that a municipality has a duty to pay its just debts and that the officials may be coerced so to do. Defendants say that in the case at bar there is no showing in the pleadings that such a situation existed; that there are no allegations in the complaint that the Village was unable to pay the judgment out of current funds without crippling the essential municipal services, or that it was unable to borrow money for a year under §15-2 of the Cities and Villages Act, or that it could not include the judgment in its next appropriation without exceeding its maximum tax levy. They concede that it is the duty of the Village to pay the judgment but that it is not mandatory that it do so by floating a bond issue, and that while the courts may compel it to perform its duty they cannot compel it to exercise its discretion in a particular manner. They also assert that in fixing the rate of interest at 4% per annum the court invaded the province of the trustees, and that the obvious reason for setting the interest at 4% was because plaintiff expressed willingness to accept the bonds with this rate in satisfaction of the judgment.

Defendants admit that plaintiff has a valid judgment and that it is their duty to pay it. They say they are not going to pay the judgment by issuing bonds because plaintiff has failed to show that the Village cannot pay it in any other way. Defendants assume that the Village does in fact as well as in law have at its disposal alternative means of paying its judgments. In their answer they advance no other method of paying the judgment. Defendants did not at any time attempt to pay the judgment by any means, nor did they at any time give any explanation for their disregard of their duty to pay the debt. Our Supreme Court has held that officials can have no higher duty than the payment of an honest debt reduced to judgment. People v. Rice, 356 Ill. 373, 377. If we assume that plaintiff's complaint was defective in that it did not allege that defendants could not pay the judgment in any way other than by the issuance and sale of bonds, such defect was waived. Defendants did not present such a defense in the trial court. Par. 3 of Sec. 42 of the Civil Practice Act provides that all defects in pleadings, either in form or substance, not objected to in the trial court shall be deemed to be waived.

The prayer of the complaint was that the interest on the bonds be at the rate of 4% per annum. It does not appear that the defendants contended in the trial court that the court should not fix the rate of interest, or that the rate should be lower. The rate of interest will be considered by a prospective purchaser of the bonds. His

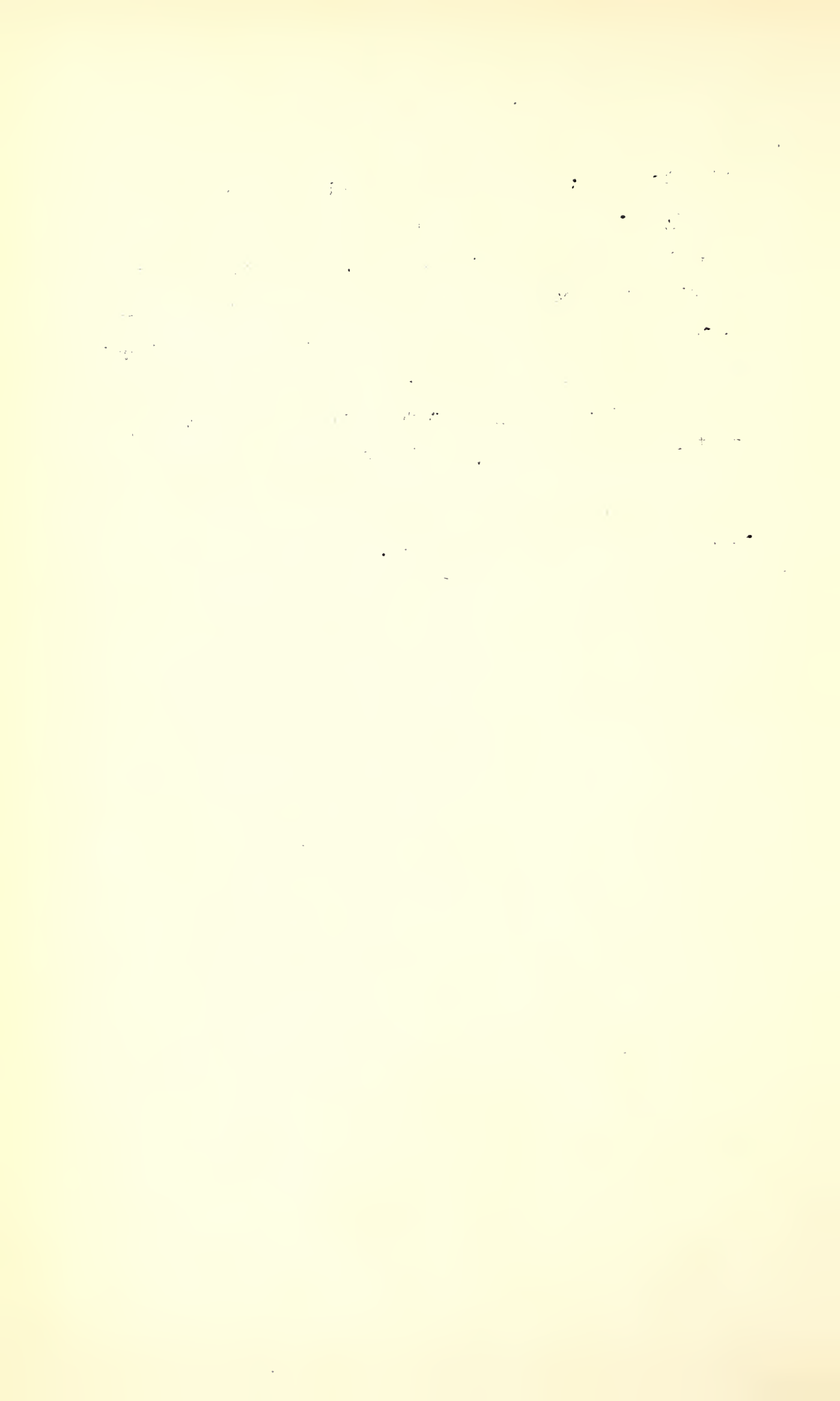
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bid will be influenced thereby. Should the bonds sell at a premium, the Village will benefit. Should the bid be lower than par, plus accrued interest, plaintiff is required to accept them at par in satisfaction of his judgment. In any event the Village will be paying 1% less than it is now obligated to pay on the judgment.

Under the pleadings the court was right in entering judgment for the plaintiff, and it is affirmed.

JUDGMENT AFFIRMED.

Friend, J., and Niemeyer J., Concur.



228

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45576

ANN OLIN,
 Appellee,
 v.
 DAVID K. OLIN,
 Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

347 I.A. 177

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Ann Olin and David K. Olin were married at Chicago on May 19, 1927. They lived and cohabited as husband and wife until January 7, 1950, with the exception of a five week period in 1948. Two children were born of the marriage, Richard A. Olin and Charles M. Olin. On September 11, 1950, Ann Olin filed a complaint for separate maintenance in the Superior Court of Cook County. At that time Richard and Charles were 16 and 13 years respectively. She alleged that on January 7, 1950, without any reasonable cause therefor, the defendant wilfully deserted and absented himself from her and has persisted in such wilful desertion and abandonment, and that she has lived separate and apart from him since January 7, 1950, without any fault on her part. She also alleged that on a prior occasion in September, 1948, he likewise abandoned her and their children without cause and persisted in such desertion until October 26, 1948, at which time he returned. In an answer he denied deserting her and asserted that the separation was at her specific request and demand. In a reply she reiterated her charge of desertion. On March 21, 1951, on plaintiff's motion, the court ordered that defendant



pay to plaintiff \$2,000 per month on account of temporary alimony and childrens' support, one third thereof being for the childrens' support, effective as of September 19, 1950; that he have credit for all payments made to plaintiff since September 19, 1950; that in addition thereto he pay the real estate taxes as they accrue against the property owned by the parties in joint tenancy located at 4929 Greenwood Avenue, Chicago; and that he also pay the premiums and maintain in full force certain life insurance policies outstanding upon his life for the benefit of plaintiff and the children. On May 8, 1951, the court ordered that defendant pay to Benjamin B. Davis and Sidney Mintz, attorneys for plaintiff, \$11,000 for professional services for the period from January, 1950, to and including the date of the order; that the motion of plaintiff for additional attorneys' fees and professional services to be rendered from the date of the entry of the order be continued generally, to be disposed of upon the application of either party or upon a hearing of the cause; and that defendant pay to plaintiff \$700 to be used by her in payment of charges made by a firm of accountants. Defendant appealed from both orders and prays that they be reversed; that an order be entered for the temporary support of plaintiff and their children in a reduced amount in keeping with their reasonable needs; that defendant be required to pay as attorneys' fees to and including May 8, 1951, an amount not in excess of \$2,000; and that the costs of the appeal be taxed against plaintiff.

The defendant is treasurer, a director and holds certificates evidencing a 28% interest in the Goldenrod Ice Cream Company, which corporation owns the entire capital stock of two subsidiary corporations. The stock of the Goldenrod Ice Cream Company, hereinafter called the corporation, is closely held, with nearly all pooled in a voting trust agreement in which defendant holds certificates evidencing his interest. The rest of the interest is owned by defendant's mother, brother, brother-in-law and certain others outside the family. Defendant's interest is not freely transferable, but is subject to the terms of the voting trust agreement which provides that it must be offered to the other parties to the agreement under certain terms and conditions. The defendant, outside of his interest in the corporation and his joint tenancy in their home, has other investments totaling not over \$12,000 in value. He is now and has been entirely dependent for his livelihood and the maintenance of his family upon his income derived from the corporation by way of salary, bonuses and dividends. His net income including salary, bonuses, dividends and income from all stocks owned by him, after the payment of taxes, was \$24,012.06 for 1945; \$24,414.38 for 1946; \$27,974.19 for 1947; \$37,919.56 for 1948; and \$40,636.91 for 1949. The corporation also paid into a pension fund, pursuant to a general plan for its employees, for the account of defendant from 1947 to 1950, yearly amounts of from \$2,842 to \$4,651. These payments were made by the corporation to purchase annuity benefits which could not be

enjoyed by any employee until he reached the age of 60, as long as he remained with the corporation. Upon his discharge or separation from the company, at the discretion of the trustees, he might be awarded partial benefits.

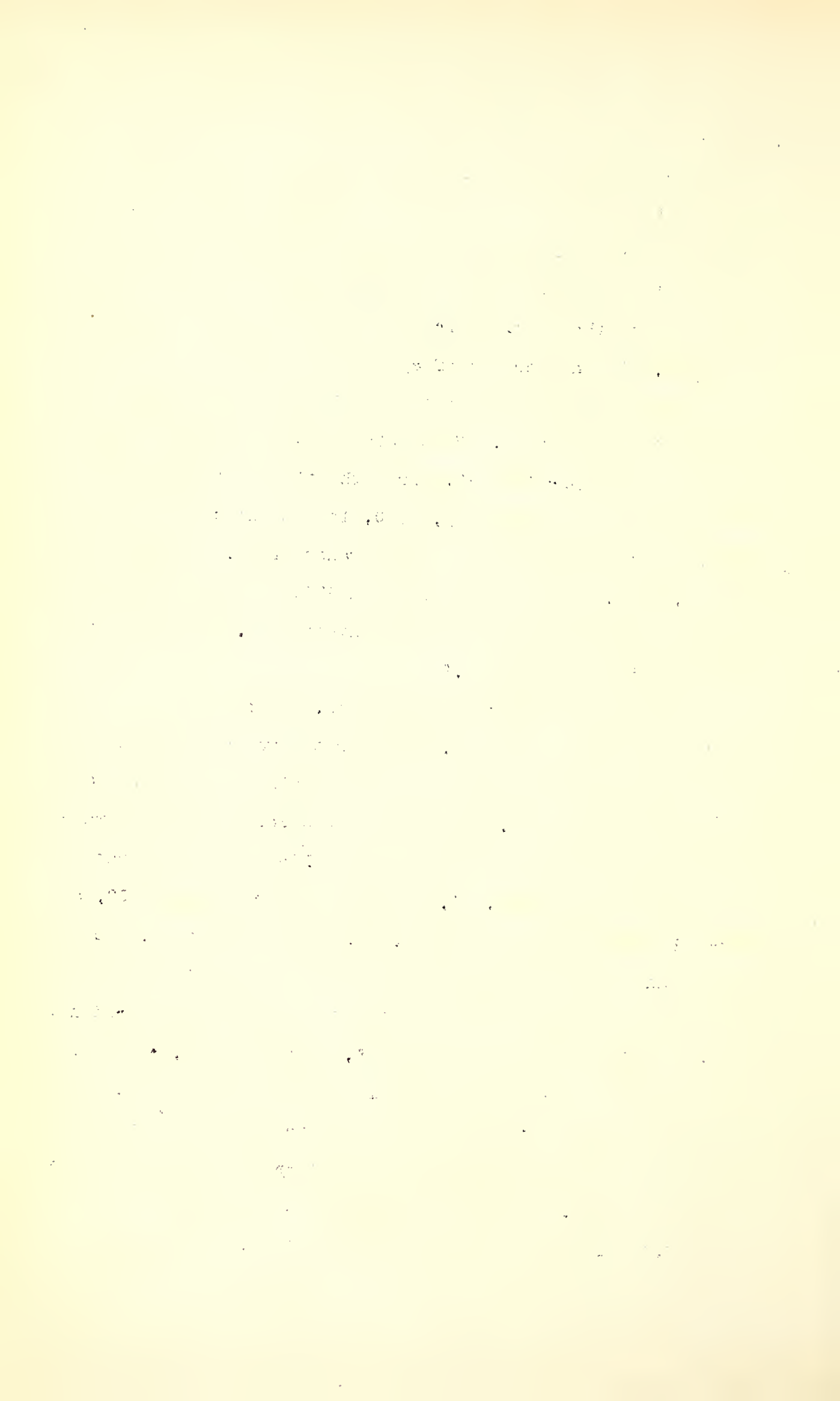
At the time of the trial, in June, 1951, defendant was 42 years of age and in good health. Plaintiff and defendant filed joint income tax returns. The joint income of the parties after the deduction of income taxes, real estate taxes and life insurance premiums, was \$20,261.06 for 1945; \$20,667.38 for 1946; \$24,223.67 for 1947; \$34,167.08 for 1948 and \$36,886.00 for 1949. The net average yearly joint income amounts to \$27,241.0 for the five year period. Since the filing of the complaint the corporation raised defendant's yearly salary in the amount of \$5,200 and by so doing the net to him for the current year will only be approximately \$800 more than the past year. Notwithstanding large earnings the defendant's manner of living required more money than that afforded by his income and he became indebted to the corporation in the sum of \$20,000. In order not to become further indebted and to make repayment he applied the 1949 dividends received by him of \$12,030 to a reduction of the indebtedness. At the time of the trial he owed the corporation a balance of \$4,251. The dividend was paid April 30, 1950, which was the last day of its 1949 fiscal year. By using it to reduce his indebtedness in April, 1950, the defendant reduced his 1950 net receipts by that amount since his income tax returns are filed on a calendar year basis. It appears that of the net amount of joint earnings and income for the year 1950 of \$36,852.82,

when reduced by the 1949 dividends retained by the corporation in reduction of his indebtedness, there remained only \$24,822.82 spendable dollars for the year 1950. Of this, \$1,200 is income of the plaintiff, so that during 1950 the defendant had only \$23,622.82 of spendable income.

In 1941 defendant built a ten room house at a cost of \$40,000, paying \$20,000 in cash and the balance by a mortgage. He furnished it for an additional \$20,000 to \$25,000. Presumably, the mortgage has been paid. The children attend a private school. The parties maintained a number of servants, kept two cars, belonged to two exclusive clubs, entertained lavishly, had charge accounts at good stores and restaurants, regularly enjoyed expensive vacations to areas such as Florida, Arizona, French Lick and New York. He maintained upon his life for the benefit of plaintiff and the children \$130,000 of life insurance, \$100,00 of which he assigned to plaintiff. He provided her with the money to pay the premiums, the total of which amounted to \$2,091 annually. From 1938 to 1949 one or both of the parties was in psychoanalysis. Altogether the defendant spent about three years in analysis, the cost thereof for both parties totaling between \$20,000 and \$22,000. Defendant estimated that the parties spent between \$65,000 and \$70,000 in 1949, \$60,000 in 1948 and about \$55,000 in 1947 for the maintenance of plaintiff, their children and himself, including insurance, real estate and income taxes. In order that plaintiff might have investments of her own, defendant gave her about \$19,000 worth of stocks and assigned to her \$100,000 face value life insurance on his life. He also made gifts of various stocks

to each of his children. Plaintiff has been receiving approximately \$1,200 a year on her own securities. The childrens' securities currently yield a combined income of approximately \$1,300 a year. Defendant has been investing the income for the boys. Defendant's ¹⁹⁵⁰/earnings included a salary of \$48,000 (an increase of approximately \$5,200 over 1949), a dividend of \$12,000 and two regular semi-annual bonuses of an undisclosed amount. No special bonus was declared in 1950 as had been done in 1949. From the time of the separation of the parties in January, 1950, to and including June, 1950, defendant gave plaintiff an allowance of \$2,000 a month. From July, 1950, she received from him \$700 a month and in addition she had an income from her own investments. She did not "touch the boys' income."

The parties employed a cook, a second maid, a cleaning man once a week, a laundress two days a week and a gardener nine months of the year. Plaintiff was given a Cadillac automobile. Defendant had a Ford automobile which he turned over to their older son. Plaintiff has a ranch mink coat costing \$4,500, a nutria coat costing \$2,000, a ranch mink jacket costing \$1,600, a blue fox stole, a beaver cape and a five sable scarf. The style of living of the parties kept advancing until in 1949 it cost the defendant, including income taxes, from \$65,600 to \$70,000, exclusive of some trips which were paid for by the corporation. Defendant contends that many of the extravagant expenditures and lavish living were occasioned by the "persistent goading of the plaintiff, whose appetite for luxuries was beyond satisfying." Defendant maintains that because of the repeated



suggestions of plaintiff's psychiatrist, he, defendant, allowed himself to become enmeshed in providing one luxury after another; that he was advised to and did try to cure her feelings of insecurity by catering to her wishes and providing her with "more and more expensive indulgences." Plaintiff estimates that she needs \$3,000 a month to maintain herself and her children as they were maintained prior to January 1, 1950. In addition to his salary, bonuses and dividend income, defendant receives indirect financial benefits. Much of his entertaining expense is charged to the corporation. Numerous vacations are likewise charged. He drives a 1950 Chrysler automobile owned by the corporation, the purchase of which and all upkeep costs him nothing. Various items ranging from butter, chickens, ice cream, soft drinks and liquor are procured without cost to him.

Defendant maintains that the order for temporary alimony and childrens' support is so arbitrary, exorbitant and excessive as to amount to an abuse of discretion. Plaintiff calls attention to the fact that the parties lived "extremely well" and that her needs and those of the two boys, excluding the numerous "free" items received from the corporation via defendant, approximates her estimate of \$3,000 per month; that when defendant left the marital home and until the following August he voluntarily gave her \$2,000 a month; and that it was only after he ceased providing support sufficient to meet the needs of plaintiff and the boys by reducing the monthly support to \$700 that she brought her action. Sec. 1 of the Separate Maintenance Act (Par.



22, Ch. 68. Ill. Rev. Stat. 1951) provides that the court may make such allowance of temporary alimony, attorneys' fees and suit money as may appear just and equitable, as in cases of divorce. Sec. 15 of the Divorce Act (Par. 16, Ch. 40, Ill. Rev. Stat. 1951) provides that in every suit for a divorce the wife or the husband, when it is just and equitable, shall be entitled to alimony during the pendency of the suit, provided that no order shall be entered until the court shall have determined from evidence the condition in life of the parties and their circumstances. Defendant asserts that the order is neither just nor equitable in that it requires from him much more than he can pay. In Harding v. Harding, 144 Ill. 588, the court said (599):

"The amount of the allowance will ordinarily, where the husband has any considerable estate, be less than what would be allowed as permanent alimony in divorce proceedings, and less than the permanent maintenance allowed in suits like the one at bar, but the amount is usually arrived at in the same manner as in awarding permanent alimony or maintenance; that is, by considering the joint income of the husband and wife. The husband's income, the estate of the wife, as well as the ages and condition in life of the parties, their ability to care for themselves, whether they are subjected to the support and education of minor children, and indeed all the circumstances shown affecting the propriety of the allowance, will be considered. * * *, she is entitled to be maintained and supported consistently with her station in life and the ability of the husband, if the money required therefor be not more than a just and equitable proportion of the joint income of herself and husband."

Plaintiff says that in determining a husband's ability to support his family the court should inquire into his income and wealth. She calls attention to a statement in the Harding case that the wife "is entitled to be maintained and supported consistently with her station in life and the ability of the husband." We agree that in determining



a husband's ability to support his family the court may take into consideration his wealth as well as his income. A husband should not be permitted to deliberately tie up his wealth in such a way that he will not have an adequate income. The chancellor requires the defendant to pay \$2,000 a month for the support of plaintiff and the children, and in addition thereto to pay the real estate taxes of \$1,560 per year and the premiums on his life insurance amounting to \$2,191 per year, a total of \$27,651 per year, effective as of September 19, 1950. The defendant's income in 1945 of over \$41,000 kept rising until in 1949 it reached \$63,294, before taxes. In 1950, after the filing of the complaint, defendant's income increased an additional \$5,200, bringing it to \$68,494. The last few years it cost the defendant for taxes and living expenses from \$65,000 to \$70,000 a year. The joint income of the parties for 1949, after payment of income taxes and deduction of real estate taxes and life insurance premiums, amounted to \$36,886, and the net average yearly joint income amounts to \$27,241.03 for the five year period. Of the joint earnings and income for 1950, \$36,886.82, when reduced by the 1949 dividends retained by the corporation in reduction of defendant's indebtedness, there remains only \$24,822.82 spendable dollars for the year 1950, of which \$1,200 is income of the plaintiff. It is obvious, without considering other factors such as defendant's wealth and interest in a pension fund, that the amount he has been ordered to pay is inequitable.

Defendant owns \$12,000 worth of securities, has a joint tenancy interest in the home and a 28% interest in the corporation. The parties do not agree as to the fair market value of the stock. An expert witness, called by defendant, testified that in his opinion the fair market value of the stock is \$282.75 a share. Computed on that basis the value of the corporation is \$2,827,500 and the value of defendant's interest is \$791,700. Since the defendant acquired his interest in the corporation at a price of \$30 a share, he would have to pay a substantial capital gains tax should he dispose of the stock. Plaintiff's brother-in-law, a dentist, testified that the defendant, in a conversation in 1947, stated that the corporation had been offered ten million dollars for its ice cream division of the business. Defendant denied having such a conversation, and points out that the minority interest, lacking control, is subject to the will of the owners of the majority interest, and for that reason could not sell for its proper proportionate share. Defendant's minority interest is further controlled by the restriction of a voting trust agreement, which prevents its free sale. The testimony of plaintiff's witness was not as to the value of the business. It was a hearsay statement of an offer, and it did not tend to prove the value of the corporation. Plaintiff did not introduce any evidence to controvert the testimony of defendant's expert. Plaintiff calls attention to undistributed profits retained in the corporation for the fiscal years of 1947 to 1950, inclusive, of \$1,093,524.48 and states that defendant's percentage thereof amounts to \$314,935.04. Plaintiff

infers that the value of the corporation is \$4,178,650.59 and that defendant's interest therein would have a fair value of \$1,203,451.37, without giving any value for the good will of the business. It does not appear that defendant can compel the payment of additional dividends. The undistributed profits are not held by the corporation in cash, but are diffused in the business assets as equipment, buildings, trucks, machinery, inventory etc. From the record we would not be justified in saying that the board of directors of the corporation are conspiring with defendant to retain these profits in the business in order to limit the dividends received by defendant. There does not seem to be any change in the conduct of the fiscal operation of the corporation because of the marital differences between plaintiff and defendant. It should be borne in mind that if a million dollars were distributed by the corporation, defendant would be entitled to his share of 28% or \$280,000. This would be subject to the payment of income tax by him, and that, added to his other income, would put him in a bracket where his tax would be close to 90%. Defendant testified that he did not wish to sell his stock at any price "because I believe it is the heritage of my two sons." Under a pension plan defendant will receive \$700 per month for life upon reaching the age of 60 years. He is now 43 years of age.

Defendant insists that the amount of attorneys' fees ordered to be paid to plaintiff's attorneys is highly excessive. Mr. Sidney Mintz, one of plaintiff's attorneys and her brother-in-law, testified that from January 5, 1950, until August 31,

1950, he had extensive conferences with plaintiff, her brother and other members of the family averaging about six hours a week over a 35 week period. He concluded that he spent about 210 hours and that most of the time was spent with plaintiff. He testified that a fair fee for the services rendered is \$30 an hour. Mr. Benjamin Davis, plaintiff's other attorney, testified that he was retained by plaintiff during the first part of September, 1950, and prepared the complaint for separate maintenance, obtained writs of injunction and prepared and argued the petition for temporary alimony and child support; that he spent 75 to 100 hours in office work and 75 hours in court work in so doing; and that he values his service at \$40 an hour for office work and \$50 an hour for court work. We agree with defendant that the case presents no unusual or complicated situation and that the data pertaining to the assets and income of the defendant were freely furnished. It is not charged that defendant sought to hide or conceal any facts with reference to his financial situation. It would be unreasonable to require defendant to pay for eight months of service, consultation and advice prior to the commencement of the suit. We are of the opinion that a fee of \$2,000 to Mr. Mintz and \$4,000 to Mr. Davis would be adequate.

For the reasons stated the orders are reversed and the cause remanded with directions to reduce the alimony and support money to \$1,200 a month, in addition to the payment of the taxes on the home and the premiums on the life insurance, and that the attorneys' fees be reduced as suggested.

ORDERS REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Friend, J., and Niemeyer, J., Concur.

45602

LIBBY ZISOOK, widow of Jack
Zisook, deceased,
Plaintiff - Appellee,

v.

INDUSTRIAL COMMISSION and DORA
ZISOOK, doing business as
Banner Decorating Company,
Defendants - Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

347 I.A. 178

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Libby Zisook, widow of Jack Zisook, deceased, filed a petition on behalf of herself and three minor children for benefits under the Workmen's Compensation Act for accidental injuries resulting in the death of her husband, arising out of and in the course of deceased's employment with defendant, Dora Zisook, doing business as Banner Decorating Company. The arbitrator of the Commission rendered a decision sustaining her claim and holding that the defendant was liable to pay her compensation for the death of her husband. The Commission reviewed the arbitrator's decision. On March 22, 1948, the Industrial Commission rendered a decision denying the claim and holding that Dora Zisook was not liable to pay Libby Zisook compensation for the death of her husband. On April 20, 1948, a writ of certiorari issued out of the Superior Court of Cook County on a praecipe filed by Libby Zisook under the provisions of Sec. 19 (f) (1) of the Workmen's Compensation Act. The writ directed the Commission to certify to the Superior Court on or before May 17, 1948, a record of the proceedings had before the Commission so that the record could be reviewed

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in the manner provided by law. On April 20, 1948, Libby Zisock deposited \$120 with the Commission toward the cost of the record, as estimated by the Commission in its decision. This deposit was returned to her attorneys by the Commission on October 21, 1949. The official reporter, who reported the testimony at the hearing before the Commission on review of the decision of the arbitrator, died on April 6, 1948. As the Commission was unable to obtain a transcription of the deceased reporter's shorthand notes, the transcript of the evidence introduced at the hearing before the Commission on review was not prepared and a record of the proceedings before the Commission was not filed in the Superior Court in return to the writ of certiorari.

The cause was listed in the printed calendar of the Superior Court issued in the fall of 1948 and thereafter appeared on the nonjury list of cases assigned to Honorable Joseph A. Graber, a judge of that court. The case appeared and was called in open court on four or five days. No one appeared on behalf of the plaintiff upon any of the occasions when the case was called. Charles Wolff, an attorney associated with the attorneys for the defendant, testified that he answered Judge Graber's call whenever the cause appeared on it. The second time it came up, February 9, 1949, Mr. Wolff advised the court that the transcript of the record of the proceedings before the Commission had not been filed, and that "this is one of those cases where the reporter who took the testimony on review died after the hearing." This witness also testified that Judge Graber at that time said he did not know what he was "going to do about those cases,"

[illegible]

and continued the matter to February 24, 1949. On that date "nothing happened." The cause next appeared on the trial call May 16, 1949, and was continued to June 21, 1949. On the latter date Mr. Wolff again reminded the trial judge that the transcript had not been filed and that the reporter was dead. He then moved that the cause be dismissed, whereupon the following order was entered:

"This cause being called for trial on the Regular trial call and no one appearing to prosecute this suit in their behalf on motion of Court it is ordered that this cause be and the same is dismissed without cost for want of prosecution."

Judge Graber testified that he remembered the case because "of the peculiar situation." He testified he dismissed the case for want of prosecution; that at the time of the dismissal he knew that no transcript had been filed for the reason that the court reporter who had taken the testimony on the hearing on review held before the Commission had died suddenly before she had the opportunity to transcribe his notes; and that he was apprised of these facts by representations made to him in open court. After the order of dismissal entered on June 21, 1949, Libby Zisock took no further action in the matter except, as stated, to accept a refund of \$120 on October 21, 1949, until she filed her motion in the nature of a writ of error coram nobis on March 28, 1951, almost two years after the order of dismissal and nearly a year and a half after the deposit for the record was refunded to her. Plaintiff's motion in the nature of error coram nobis recites the facts as to the filing of a praecipe, the issuance of a writ of certiorari,

1. The first part of the paper discusses the importance of maintaining accurate records of all transactions. It emphasizes that proper record-keeping is essential for the success of any business or organization.

2. The second part of the paper describes the various methods used to collect and analyze data. It includes a detailed explanation of the sampling process and the statistical techniques employed to interpret the results.

3. The third part of the paper presents the findings of the study. It shows that there is a significant correlation between the variables being studied, which supports the hypothesis that was tested.

4. The fourth part of the paper discusses the implications of the findings and suggests areas for further research. It concludes by stating that the results of this study have important implications for the field of research.

5. The fifth part of the paper is a conclusion that summarizes the main points of the study. It reiterates the importance of the findings and the need for continued research in this area.

6. The sixth part of the paper is a list of references that cites the sources used in the study. It includes a variety of books, articles, and other publications that are relevant to the topic.

7. The seventh part of the paper is an appendix that contains additional information that is not included in the main text. It includes a list of abbreviations and a glossary of terms.

8. The eighth part of the paper is a bibliography that lists the sources used in the study. It includes a variety of books, articles, and other publications that are relevant to the topic.

9. The ninth part of the paper is a list of figures and tables that are included in the study. It provides a brief description of each figure and table and explains how they are used in the study.

10. The tenth part of the paper is a list of footnotes that provides additional information about the study. It includes details about the authors, the funding sources, and other relevant information.

the deposit for the record and the failure of the Commission to certify the record of the proceedings because of the death of the court reporter. After summarizing the provisions of Sec. 19 (f) (1) of the Workmen's Compensation Act to the effect that the Superior Court was given power to review questions of law and fact presented by the record and then either to confirm or set aside the decision or to remand the cause, the motion states that the plaintiff has always been ready to proceed but was unable to do so because no record was ever filed, and alleges that none of these facts was known to the trial court, and that had it known such facts it would have remanded the cause to the Commission rather than dismiss it. Defendant's motion to dismiss plaintiff's motion was overruled.

On May 3, 1951, the court vacated and set aside the order of June 21, 1949, (dismissing the case for want of prosecution) and remanded the cause to the Commission for further proceedings. Notwithstanding such order the defendant was permitted to file an answer to plaintiff's motion in the nature of a writ of error coram nobis. At the hearing on plaintiff's motion and the answer thereto the plaintiff introduced no evidence. The defendant introduced the testimony of Judge Graber and Mr. Wolff. At the conclusion of the hearing the trial judge found that the cause appeared on the trial call of Judge Graber on December 15, 1948, February 9, 1949, February 24, 1949, May 16, 1949, and June 21, 1949; that neither the plaintiff nor her counsel answered "this cause

on the trial call" upon any one of the occasions when it appeared thereon; and that at the time the cause was dismissed for want of prosecution Judge Graber knew that the transcript of the proceedings before the Commission had not been filed in the Superior Court because of the death of the official court reporter who reported the hearing on review before the Commission. The court refused to find that plaintiff did not prosecute her cause between May 17, 1948, and March 28, 1951, and also refused to find that plaintiff was negligent in failing to answer the call before Judge Graber. The court held as a matter of law that "if this court lacked jurisdiction to dismiss this cause for want of prosecution on June 21, 1949, its error in assuming such jurisdiction was one of law and not of fact." The court on May 22, 1951, entered an order that the order of May 3, 1951, shall stand as the order of the court.

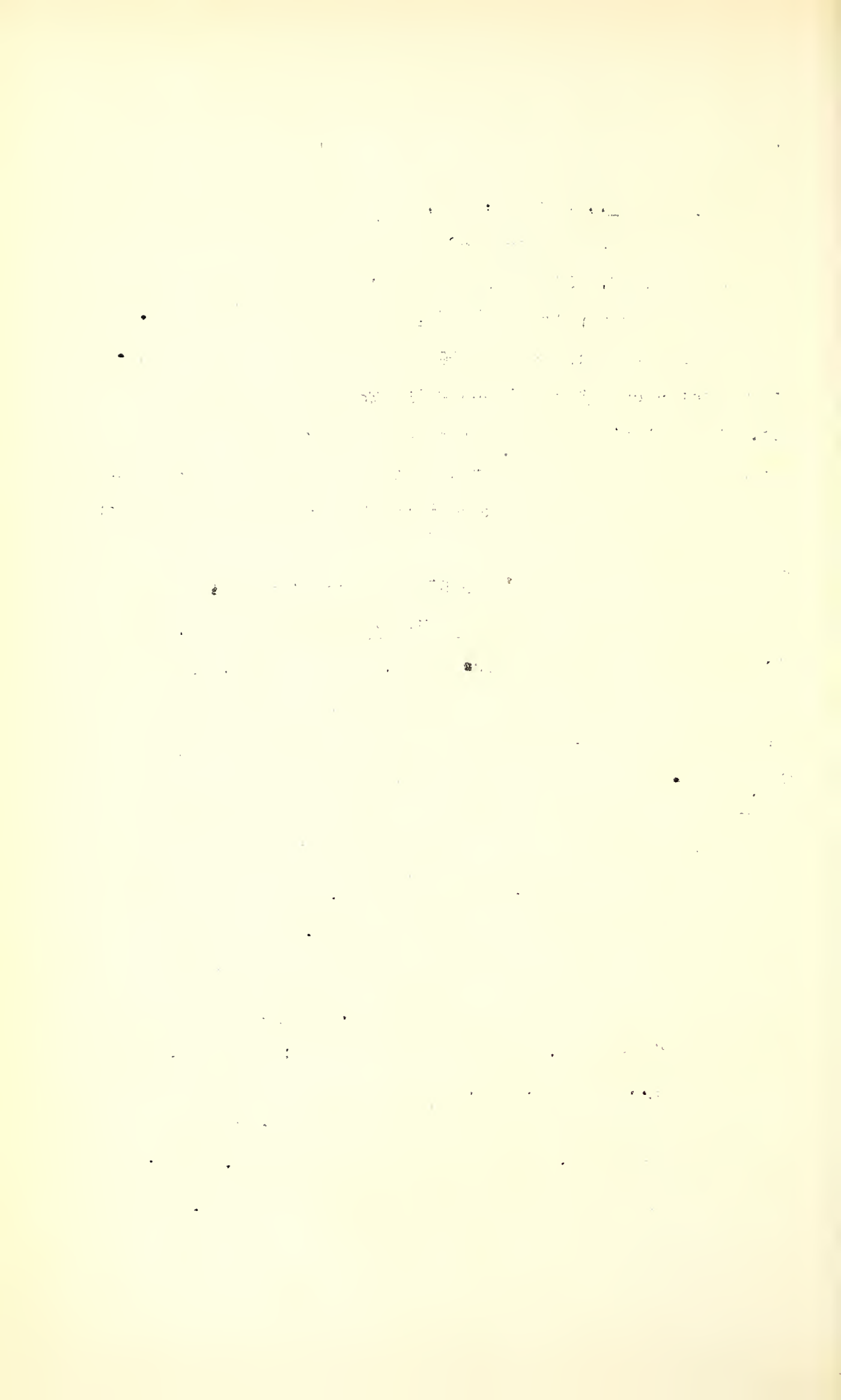
Defendant maintains that the order of May 22, 1951, vacating the order of dismissal is a final and appealable order. Plaintiff, on the other hand, says that the order is not a final and appealable order. It has been held that any order which finally determines the issues made by a motion under Sec. 72 of the Civil Practice Act is a final and appealable order. People v. Union Trust Bank, 406 Ill. 208; Jerome v. Quincy Street Building Corp., 385 Ill. 524; and Zitnik v. Burik, 327 Ill. App. 170. We hold therefore that the order vacating the order of dismissal is a final and appealable order. Plaintiff asserts that the instant appeal

will not lie to this court within the provisions of Sec. 77 of the Civil Practice Act, and that this is a statutory proceeding in which there can be no review by this court. She calls attention to Sec. 19 (f) (2) that judgments and orders of courts under the Workmen's Compensation Act shall be reviewed only by the Supreme Court on a writ of error which that court in its discretion may order to issue, if applied for within 60 days after the rendition of the judgment or order sought to be reviewed. It will be observed that the order appealed from in the instant case was entered under the provisions of Sec. 72 of the Civil Practice Act and not under the provisions of the Workmen's Compensation Act. The latter makes no provisions for the procedure adopted by the plaintiff. We conclude therefore that Sec. 19 (f) (2) of the Workmen's Compensation Act applies only to judgments and orders under that act. The Workmen's Compensation Act of 1911 contained no provisions for an appeal from a decision of the Circuit Court awarding compensation under that act, just as the statute now in force is silent on the subject of an appeal from an order entered pursuant to a motion in the nature of a writ of error coram nobis. The Supreme Court held in Christensen v. Bartelmann Co., 273 Ill. 346, that in view of the silence of the Workmen's Compensation Act on the question, appeals were governed by the provisions of Sec. 91 of the Practice Act of 1907. In our opinion the Christensen case is controlling and the jurisdiction of this court is to be determined solely by the provisions of Sec. 77 of the Civil Practice Act. In Lasley v.

Tazewell Coal Co., 294 Ill. 399, on petition of the plaintiff, the Industrial Commission fixed his fees as the petitioner's attorney at \$400. Plaintiff sought to enforce such order by an action in assumpsit in the Circuit Court. The Supreme Court transferred the appeal to the Appellate Court because it was not a case brought under the Workmen's Compensation Act. Plaintiff's motion in the nature of a writ of error coram nobis is no more related to the compensation proceedings than was the action of assumpsit to the award of compensation in the Lasley case.

Courts have the inherent power to dismiss cases for want of prosecution. Wainright v. McDonough, 290 Ill. App. 50; Patterson v. Northern Trust Co., 286 Ill. 564. An order dismissing a case for want of prosecution is a final and appealable order. Plaintiff could have sought review of the order entered by Judge Graber under Sec. 19 (f) (2) of the Workmen's Compensation Act. We agree with defendant that if Judge Graber erred in dismissing the cause the error was one of law. The trial court so held. An alleged error of law cannot be examined, revised or corrected by the court on a motion entered after the close of the term wherein the final judgment was entered. See Pisa v. Rezek, 206 Ill. 344; Tosetti Brewing Co. v. Koehler, 200 Ill. 369; Jerome v. Quincy Building Corp., 385 Ill. 524.

The only alleged error of fact was that Judge Graber did not know that the record was not filed because of the death of the official reporter who reported the case. The



testimony of Judge Graber and Mr. Wolff was that the former knew that the record was not filed because of the reporter's death. Plaintiff's motion should have been denied for the further reason that her own negligence contributed to the dismissal of the action. She should have known that a record was not on file and was aware of it when she accepted a refund of the deposit. The suit was not dismissed for failure to file a record but because plaintiff did not prosecute the suit.

Plaintiff argues that defendant's motion to dismiss her motion admitted the material allegations of her motion, including errors of fact. It is well settled that a motion to dismiss admits the facts alleged in the pleadings attacked only for the purpose of testing its sufficiency. Citizens National Bank of Alton v. Glassbrenner, 377 Ill. 270. The fact that by operation of law defendant's motion admitted certain allegations for a specific purpose and that later defendant denied the same allegations is not inconsistent. Plaintiff asserts that the notice of appeal specified only the May 22, 1951, order and states that this appeal is directed to the denial of defendant's motion to vacate the order of May 3, 1951, and ^{the} to remand to the Industrial Commission for further proceedings, and that hence the present appeal is limited to the consideration of these two parts of the order of May 22, 1951. Defendant did not elect to stand on her motion to dismiss, but moved to vacate the order of May 3, 1951, and to file an answer. The order of May 3, 1951, did not become final until the motion to vacate it was disposed of by the order of May 22, 1951. The notice

of appeal from the final order of May 22, 1951, was sufficient to review the orders of May 3, 1951, and May 22, 1951.

Plaintiff argues that Judge Graber lacked jurisdiction to dismiss the compensation case. Jurisdiction was conferred by the filing of the praecipe for writ of certiorari and the service of process. Woodward v. Ruel, 355 Ill. 163, 168. We are of the opinion that Judge Graber had jurisdiction of the subject matter and of the persons. In the trial court plaintiff did not urge any jurisdictional defect. Her position was that there was an error in fact and that hence she was entitled to relief under a motion in the nature of a writ of error coram nobis.

For the reasons stated the orders of the Superior Court of Cook County entered May 22, 1951, and May 3, 1951, are reversed.

ORDERS REVERSED.

Friend, J., and Niemeyer, J., Concur.

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45611

CENTRAL NATIONAL BANK, Trustee
under Trust No. 811,
Appellee,

v.

BERNARD E. PASET,
Appellant.

APPEAL FROM

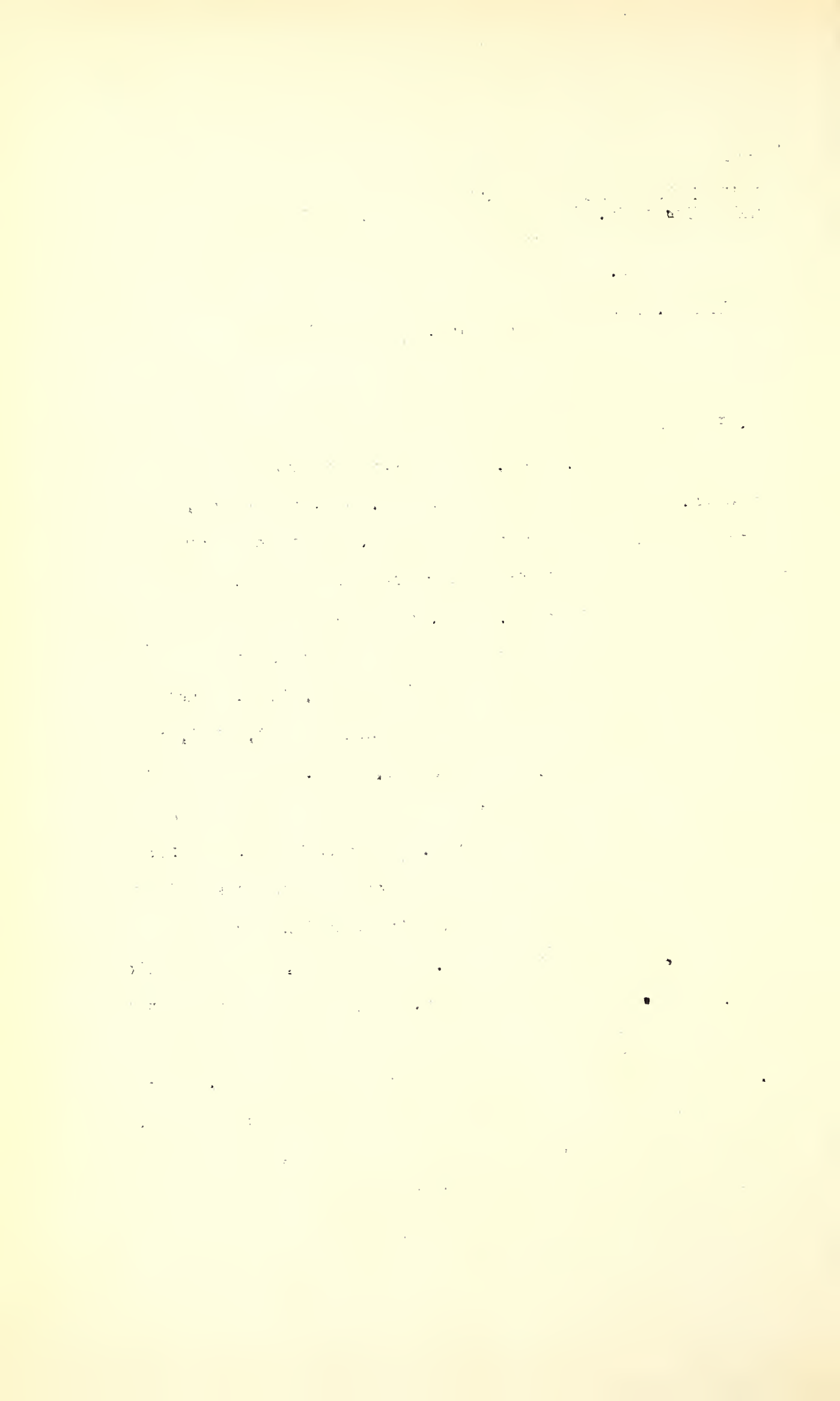
MUNICIPAL COURT

OF CHICAGO

348 I.A. 179¹

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On June 10, 1946, the Central National Bank in Chicago, as Trustee under Trust No. 811, as lessor, entered into a written lease with Bernard E. Paset for apartment No. 1, at 6018 North Washtenaw Avenue, Chicago, for a term commencing June 10, 1946, and expiring April 30, 1949, the lessee having an option for an extension of two years. The option was exercised. On February 2, 1951, a notice that the tenancy "will terminate" on April 30, 1951, was served on the tenant. On March 30, 1951, the Area Rent Director issued a "Corrected Certificate" authorizing Central National Bank, Trustee, under Trust No. 811 for the beneficial use of certain persons, to pursue remedies for the eviction of the tenants in accordance with the requirements of the local law. Thereafter, Central National Bank, as Trustee under Trust No. 811, filed a statement of claim in the Municipal Court of Chicago against Bernard E. Paset for possession of the described premises, which allegedly defendant unlawfully withholds from plaintiff. A trial without a jury resulted in a finding and judgment that defendant unlawfully withholds possession of the premises and that plaintiff is entitled to possession thereof.



Defendant appeals.

Defendant states that plaintiff did not have and was not entitled to possession of the premises at the commencement of this action and could not properly institute the action. Defendant relies on a clause in the lease which reads:

"The Lessee hereunder is charged with the knowledge that the Lessor, while purporting to act as the owner of said premises, does not in fact have possession nor exercise any rights of dominion thereon."

Defendant maintains that plaintiff not only failed to prove its right to possession, but proved affirmatively that it did not have the right to possession. We agree with plaintiff that the quoted provision was for the benefit and protection of the lessor and does not deprive it of the right to maintain its action in forcible detainer.

Defendant knew that plaintiff was his landlord. In the lease he agreed that at the termination thereof he would yield up immediate possession to the lessor. The trust agreement between plaintiff and the beneficiaries thereof, dated May 14, 1946, was received in evidence as defendant's exhibit. It is substantially the same as trust agreements discussed in Liberty National Bank of Chicago v. Kosterlitz, 329 Ill. App. 244, and Handler v. Alpert, 331 Ill. App. 405, (abst.). In the Liberty National Bank case we held that the interest of the beneficiaries was personal property, that they could not be lessors of any part of the premises and that "this fact is not altered by the provisions empowering them to manage the property, control the renting, receive the proceeds from the rentals and to handle rents." In the Handler case it was urged by defendant that plaintiff had no right to maintain the action since he was

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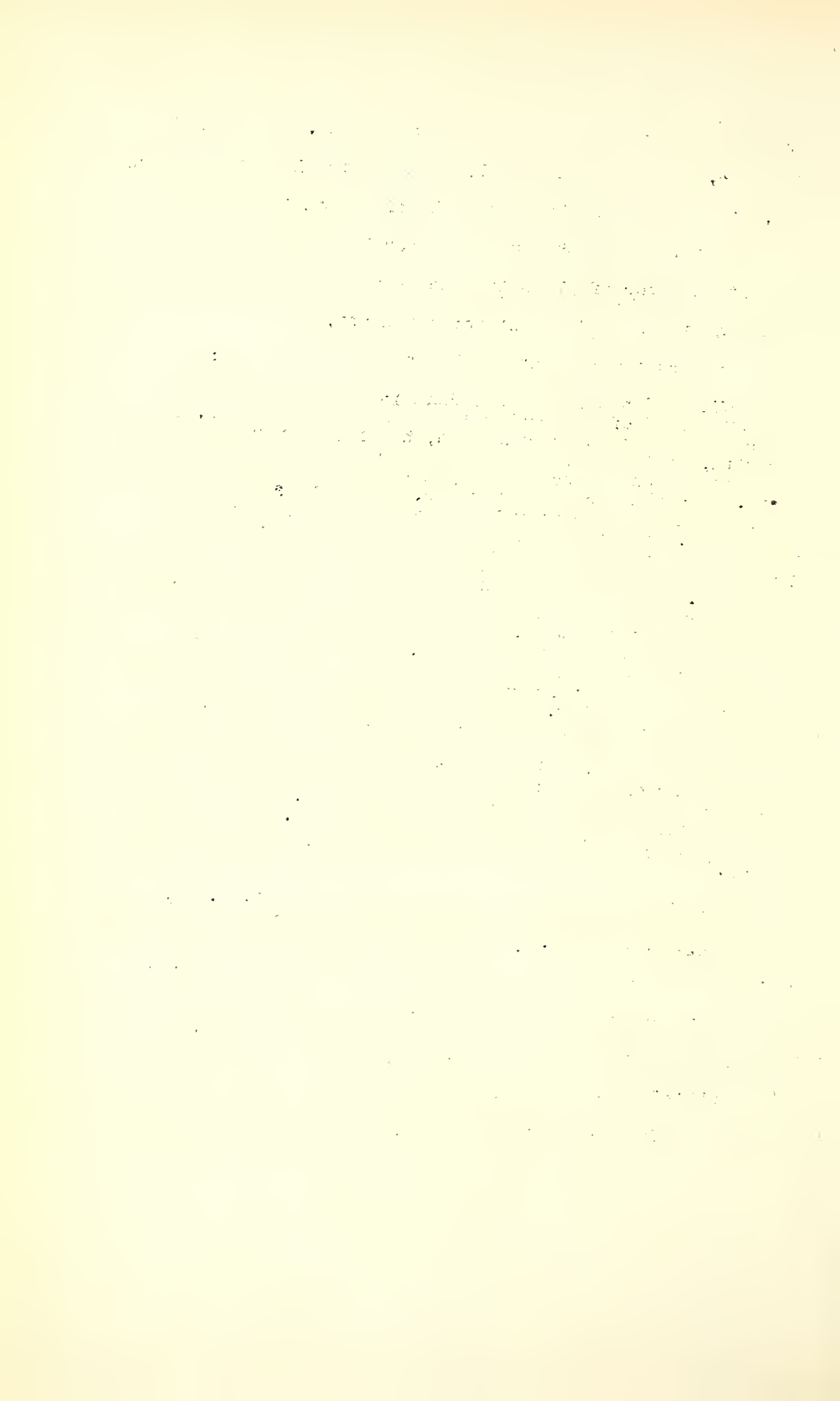
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only a beneficiary under the trust agreement. We said that the title, equitable and legal, being in the Liberty National Bank, it and it alone had the right of action in forcible detainer at the time the suit was brought and reversed the judgment in favor of plaintiff and remanded the cause with directions to enter judgment for defendant.

The trust agreement in the case at bar states:

"While Central National Bank in Chicago is the sole owner of record of the real estate referred to herein, and so far as the public is concerned, has full power to deal therewith, it is understood and agreed by the parties hereto and by any person who may hereafter become a party hereto, or a beneficiary hereunder, that said Central National Bank in Chicago will * * * convey title to said real estate; execute and deliver deeds or otherwise deal with the title to said real estate only when authorized to do so in writing and that it will * * * on the written direction of Felix M. Silverstein * * * or on the written direction of such person or persons as may be beneficiary or beneficiaries at the time, make deeds for, or otherwise deal with the title to said real estate, * * * The beneficiary or beneficiaries hereunder shall in his, her or their own right have the full management of said real estate and control of the selling, renting and handling thereof, and any beneficiary or his or her agent shall handle the rents thereof and the proceeds of any sales of said property, and said Trustee shall not be required to do anything in the management or control of said real estate * * *, except on written direction as hereinabove provided * * *. No beneficiary hereunder shall have any authority to contract for or in the name of the Trustee or to bind the Trustee personally."

In Continental Illinois National Bank & Trust Co. v. Windsor Amusement Co., 288 Ill. App. 57, in discussing a trust agreement which said that the trustee is the sole owner of the real estate and that "so far as the public is concerned, has full power to deal with it," this court said that the term "public" applied to the tenants' status and that the trustee had full power to deal with the property so far as



the tenants were concerned. We are of the opinion that plaintiff was the proper party to institute and prosecute the instant action in forcible detainer. Subject to certain exceptions and qualifications, a tenant in undisturbed possession of the leased premises is estopped to deny the title of his landlord, as it existed in him at the time of the creation of the tenancy. See 51 C J S, Landlord and Tenant, Sec. 266, p. 909. We are satisfied that the rule is applicable to the parties in the instant case and that under the facts presented defendant is estopped to deny plaintiff's right to maintain the action.

Defendant states that the court erred in refusing to allow him to introduce evidence of a conversation with one of the beneficiaries of the trust under which a parol lease was created for the period ending September 30, 1951. We agree with defendant that a parol lease is valid where the term is less than a year and the term expires within a year from the time the lease is made. The offer of proof by defendant was of a conversation with one of the beneficiaries. There was no attempt to show that the beneficiary had actual or apparent authority to bind the trustee or other beneficiaries. Defendant knew that his lease was with plaintiff. The trust agreement which he introduced provides that no beneficiary thereunder shall have any authority to contract for or in the name of the trustee, or to bind the trustee personally. This trust instrument also provides that the trustee will deal with the title on the written direction

of Felix Silverstein, and that such right of direction "shall also include and embrace all other matters pertaining to the beneficial interest thereunder." Felix Silverstein was the beneficiary who was given the right of direction to the trustee as to all matters pertaining to the beneficial interest of the parties, and it is not contended that he gave any direction to plaintiff to make an oral lease. There was no offer to prove that plaintiff or anyone authorized entered into an oral lease. The court did not err in refusing to receive testimony as to an oral lease with an unauthorized person.

Finally, defendant argues that the Housing and Rent Act, as amended, and the Rent Regulations promulgated thereunder forbid the maintenance of the action. We have held that plaintiff, as trustee, has a right to prosecute the action. In the trial of the case no question arose as to the good faith of plaintiff in prosecuting the case in order to give possession of the apartment to one of the beneficiaries. The certificate of eviction was in due form. In our opinion plaintiff complied with the provisions of the Housing and Rent Act and the Regulations adopted thereunder.

For the reasons stated, the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend, J., and Niemeyer, J., Concur.

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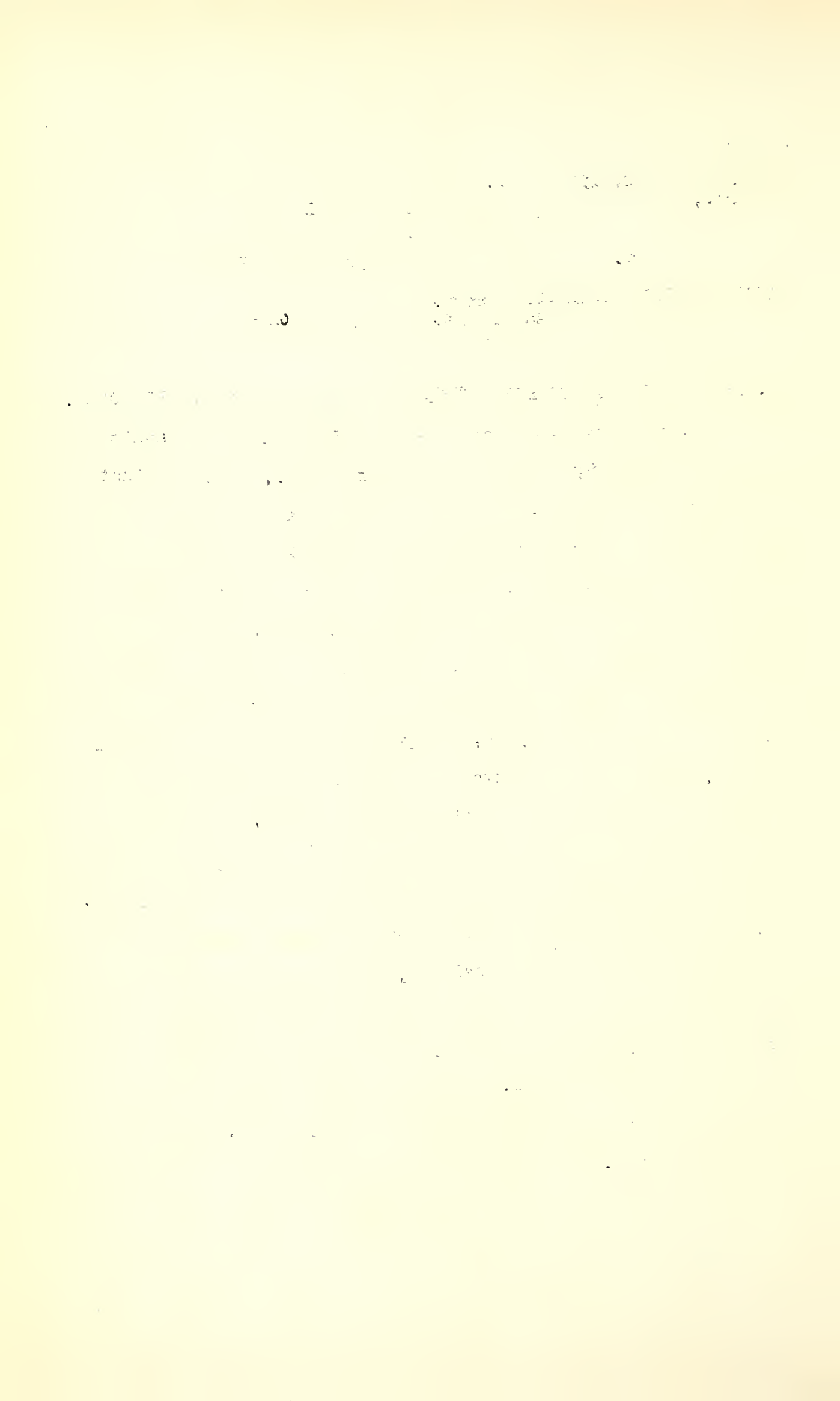
COLUMBIA LITHOGRAPHIC CO., Inc.,
a corp.,
Appellee,
v.
COOK CHOCOLATE COMPANY, a corp.,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO

347 L.A. 179²

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In an amended statement of claim filed in the Municipal Court of Chicago by Columbia Lithographic Co., Inc., against Cook Chocolate Company, a corporation, plaintiff alleged that defendant purchased 200,000 milk chocolate labels at \$2.50 per thousand, in accordance with a written purchase order, and that it delivered to defendant 201,000 milk chocolate labels; that it also shipped to defendant 378,000 milk chocolate labels and 108,000 bittersweet chocolate labels at a price of \$1,215, and that there was due to plaintiff \$1,830.50, plus statutory interest. In its answer defendant admitted ordering the 201,000 labels, but alleged that there was no consideration for the order for the reason that the labels were in fact the property of defendant, which had purchased them from one Mittelstaedt. Defendant denied ordering the additional 486,000 labels and alleged that these labels also were the property of defendant, who purchased them from Mittelstaedt, and also denied it was indebted to the plaintiff. A trial without a jury resulted in a finding and judgment against defendant for \$1,830.50. Defendant appeals.



The evidence presented consisted of correspondence between the parties and the testimony of Edmond Opler, president of defendant. Plaintiff has its place of business in New York City. Defendant's place of business is in Chicago. Alfred Mittelstadt was in business at Paramus, New Jersey, under the name of Dama Company. On or about September 28, 1948, defendant purchased from Mittelstadt certain personal property including "approximately three million assorted Dama labels" and "all packing supplies such as foil, boxes, cases, etc," paying Mittelstadt \$10,000 therefor. Defendant subsequently received from Mittelstadt only 1,406,500 labels, or approximately 1,594,500 labels less than it purchased. On January 5, 1949, plaintiff, in a letter to defendant, stated that it had been informed by Mittelstadt that defendant had purchased the equipment and trade name of "Dama Company" and that plaintiff had on hand 486,000 Dama bar wraps and offered to sell them to defendant at \$2.50 per thousand. Plaintiff also stated that it had the original art work, positives and plates on all wraps plaintiff had been manufacturing for Mittelstadt. Defendant acknowledged the letter and promised to contact the plaintiff when more "Dama" labels were needed. The parties use the term "bar wraps" and "labels" synonymously. On March 31, 1949, defendant sent its written purchase order for 200,000 Dama Almond Milk Chocolate Labels. These labels differed from the plain milk chocolate labels. On March 15, 1949, plaintiff offered to sell to defendant 1,000 pounds of Dama silver foil at 52 cents per pound. On March 24, 1949, plaintiff solicited an

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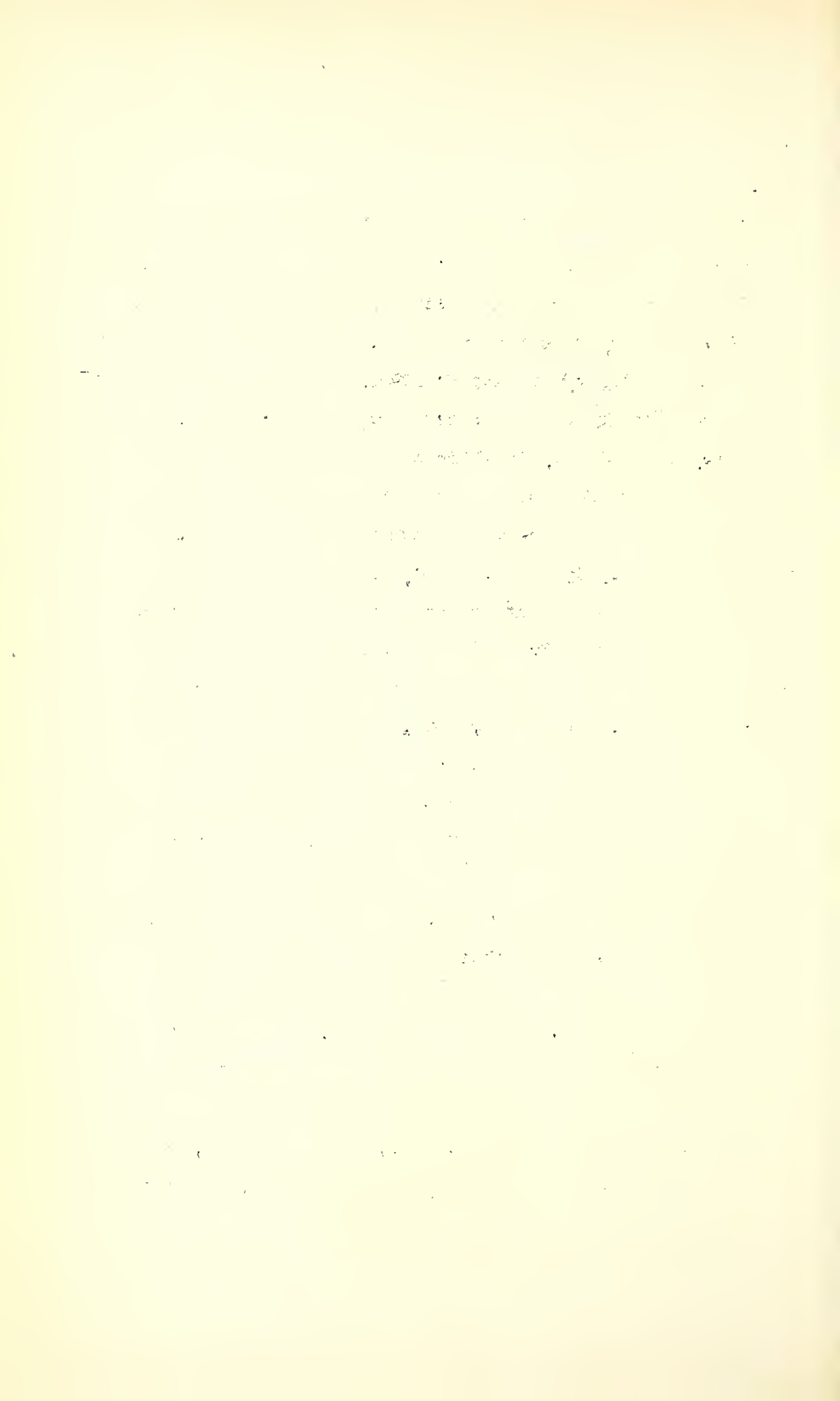
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offer from the defendant for the foil. On April 16, 1949, defendant wrote plaintiff that by its purchase of "Dama" equipment it was the understanding that "we would receive all inventory of labels, foil, boxes, etc. Mr. Mittelstadt advises that these 100 rolls of foil you have were taken as 'collateral' by you, due to the fact that you had a stock of labels undelivered. As we have assured you that we will, before buying elsewhere, take your labels on hand, the need to hold this foil as 'collateral' is no longer there and we would therefore appreciate it if you would ship this foil to us, no charge, with the balance due on our order No. 8568." The order No. 8568 is the original purchase order of March 31, 1949, signed by defendant and addressed to plaintiff for 200,000 Dama Almond Milk Chocolate Labels at \$2.50 per thousand.

In a letter dated April 27, 1949, to defendant, the plaintiff said: "With reference to the silver foil on hand, Mr. Mittelstadt has just reported that he has made the following agreement with you: If all the labels on hand are purchased by you, we are to ship to you all of the silver foil on hand - approximately 1000 lbs. at no cost. If this is so, kindly confirm by mail and we shall ship you all the labels on hand together with the silver foil and invoice you as per our original agreement." On May 4, 1949, defendant inquired about the shipment of 200,000 labels under its order No. 8568. A hand written postscript states that part of the order arrived after the letter was typed. The last paragraph of the letter said: "At the same time, please get

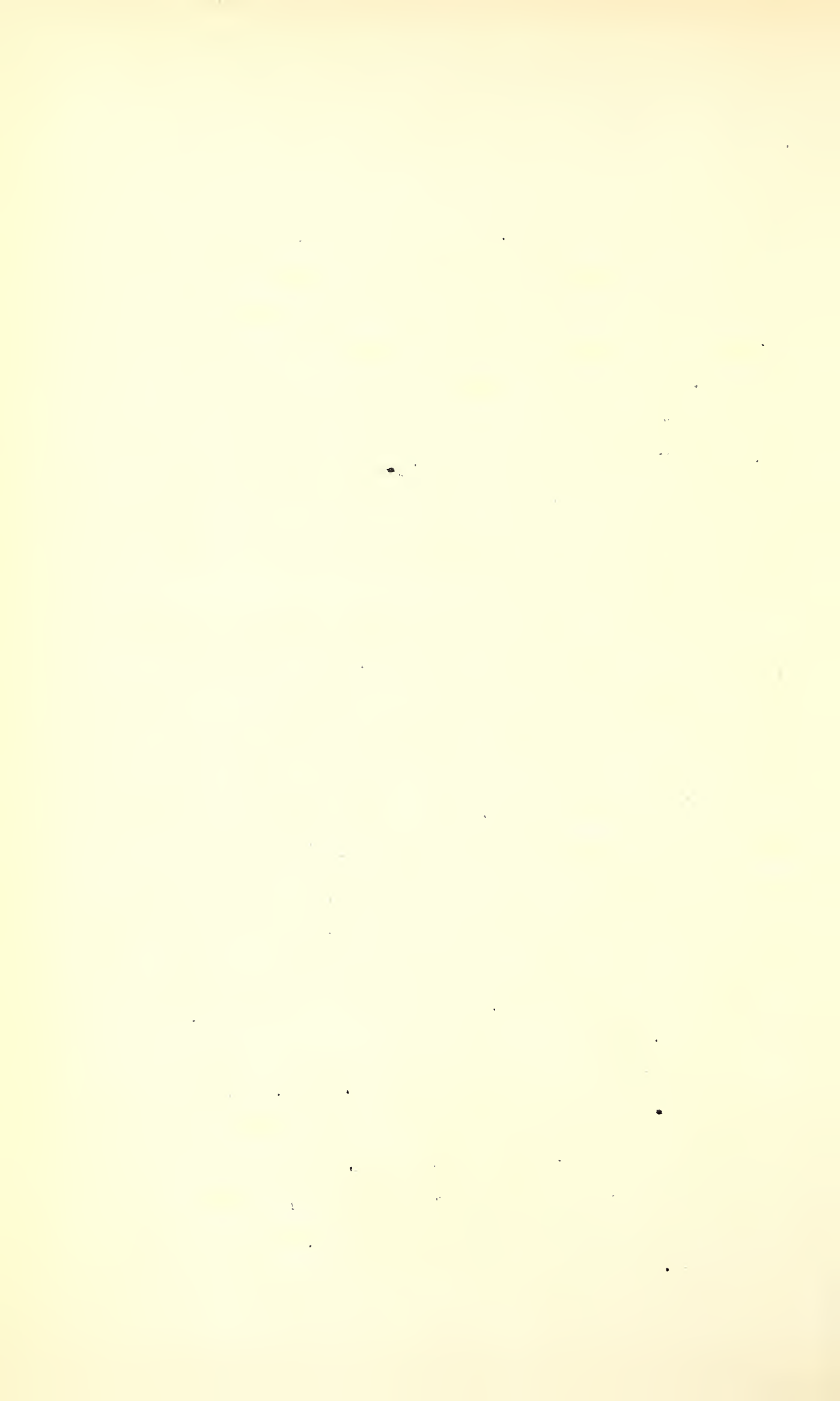
that thousand pounds of foil to us with our assurance, as per our several conversations, that we will use the 378,000 milk chocolate labels and 108,000 bitter chocolate labels which you have, as soon as possible. You will not be stuck with these labels." On May 5, 1949, defendant sent to plaintiff its purchase order for 1,000 pounds of Dama foil, without charge. Thereafter, plaintiff shipped the foil to defendant. Although no purchase order was submitted or request therefor made, plaintiff shipped to defendant on May 27, 1949, the 486,000 labels. On May 5, 1949, defendant repeated its request for the shipment of the silver foil and the balance of its order No. 8568. Plaintiff sent its invoice in the sum of \$1,215 with the shipment of the silver foil and the 486,000 labels. On May 27, 1949, defendant wrote plaintiff as follows: "Confirming our 'phone conversation, as per your request, we will for the present, hold the Dama chocolate labels you shipped us without our authority. We are herewith returning your invoice #9485 in the amount of \$1215, as the goods were not ordered." On June 1, 1949, plaintiff replied to defendant's letter of May 27, 1949, that the labels shipped "together with the silver foil were forwarded in accordance with instructions from Mr. Alfred Mittelstaedt." Defendant's letter also stated: "As explained to you on your personal visit to the office, the goods in question are not the property of Columbia Lithographic Company, Inc., and, therefore, we have no jurisdiction over the method of its disposal. * * * We are not concerned with whether or not you buy these labels as they are the property of Dama Company and are covered by a deposit



with us. You can readily see, therefore, that we are not pressing you to purchase these labels and that if you are going to purchase them you will have to make arrangements with Mr. Mittelstadt directly as to how and when you are to purchase them. In other words, we have no authority to segregate the two items and ship the foil now and the labels later on. * * * We shall hold the invoice which you have returned to us until we hear further from Mr. Mittelstadt, and would suggest that you contact him yourselves in order to straighten out this matter."

On July 1, 1949, plaintiff wrote defendant, calling attention to the unpaid bill of May 9, 1949, for \$615.50 (for the 201,000 labels) and requested payment. It will be observed that this was not a demand for payment for the 486,000 labels. On July 6, 1949, defendant acknowledged receipt of this letter and stated: "Our purchase order from Dama included all Dama chocolate labels. You advised in your letter of June 1, that the labels shipped us were not your property but were Dama's property, and as we have already purchased all these labels we would appreciate it if you would now cancel your charge against us. Under the circumstances, we owe you no money."

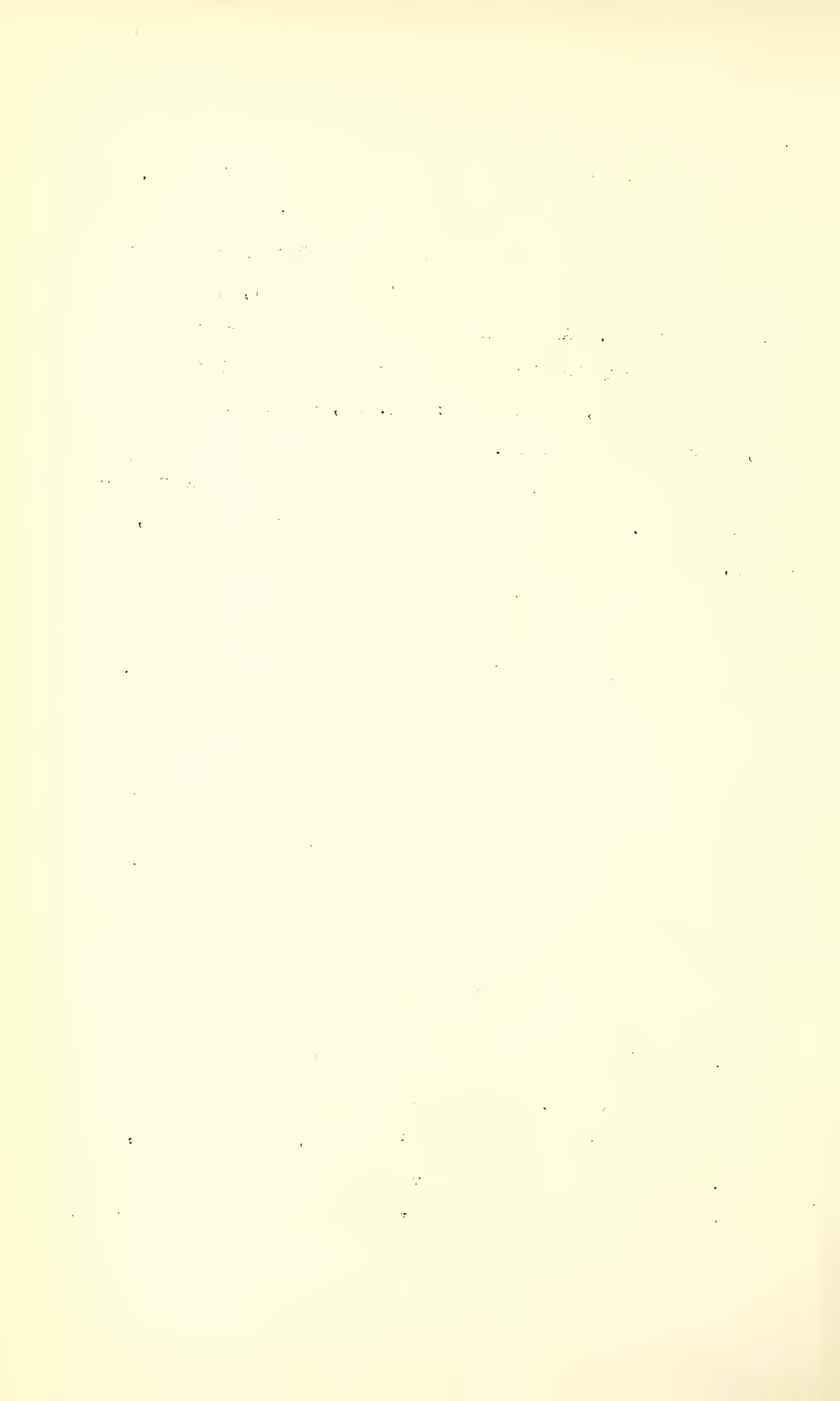
The copy of the letter of September 28, 1948, from defendant to Mittelstadt, constituting the purchase agreement, was not received in evidence. Sheets of paper, said to be memoranda of the merchandise received from Mittelstadt a short time after the purchase from him were not admitted. However, the testimony of Mr. Opler, president of defendant, brought



out on direct and cross-examination, established the facts sought to be proved by these exhibits. He testified that on May 27, 1949, when he returned to plaintiff the invoice for \$1,215, saying that the goods were not ordered, he did not "think they were our labels." He testified that the agreement represented by the letter of September 28, 1948, was executed by Mittelstadt and defendant and that two copies were signed; that one of the signed copies was delivered to Mittelstadt; that defendant's copy was placed in its file; that diligent search was made for it; and that it could not be found. Defendant sought to introduce an unsigned copy of the agreement. The court refused to admit it on the ground that it was not the best evidence. The trial judge took the view of plaintiff's attorney that defendant did not show that the copy the witness testified was delivered to Mittelstadt could not be produced. The witness identified the purchase order from Mittelstadt and this order was admitted over plaintiff's objection. Plaintiff does not contend that the court erred in admitting this exhibit. The court also admitted checks drawn by defendant showing the payment of the consideration of \$10,000 to Mittelstadt. On cross-examination the witness testified that he was present at the time Walter Zech counted the items in the inventory of chattels received from Mittelstadt, and that there were 1,406,500 labels in the inventory. Witness further testified that Zech called him and that he went to the receiving room and checked the inventory with Zech, who was defendant's receiving clerk, and that he knew of his own knowledge from an actual count when

the labels came in about ten days after October 4, 1948, that 1,406,500 labels were received. In answer to a question as to whether he knew of his own knowledge whether defendant received three million labels from Mittelstaedt, he answered in the negative. Answering the question as to whether he knew how many labels were received from Mittelstaedt by the defendant, he answered: "1,366,000 of one size and 40,000 of the other size."

Witness testified that he had a telephone conversation with Mr. DeVita of plaintiff corporation on May 27, 1949, in which he told Mr. DeVita that a shipment had come in of foil and labels "which I didn't want; that we were not going to accept the labels and were not going to pay for them and that we would return the invoice and labels; that we merely wanted the foil"; that Mr. DeVita said to him: "These labels were shipped on Mr. Mittelstaedt's instructions. If you don't want them, I wish you would, as an accommodation take them and you may return the invoice and adjust the matter with Mittelstaedt at a later date"; and that witness said "Okay." Witness testified further that defendant did not place any order with plaintiff verbally or in writing for the 486,000 labels; that the labels are in defendant's plant at Chicago; that it has not used any of them; and that defendant does not expect to return them as they are its labels. On cross-examination, in answer to a question as to whether between September, 1948, and May, 1949, defendant made a claim to "anybody that you were a million and a half labels short and that this 486,000 was included in



that million and a half," he answered to the affirmative, and stated that the claim was made to Mittelstadt. Witness said that no such claim was made to plaintiff.

We are of the opinion that the exchange of letters between the parties and the testimony of Mr. Opler supports defendant's contention that the judgment should be reversed. The evidence shows that the 486,000 labels and the foil were included in the chattels purchased by defendant from Mittelstadt for \$10,000. Neither party called Mittelstadt or any officer or employee of plaintiff. Defendant did not purchase any part of the 486,000 labels shipped to it by plaintiff. On June 1, 1949, plaintiff wrote defendant, calling attention to a telephone conversation on May 27, 1949, and said that the "goods in question are not the property" of plaintiff, that plaintiff had "no jurisdiction over the method of its disposal"; that plaintiff was "not concerned with whether or not you buy these labels as they are the property of Dama Company and are covered by a deposit with us"; and that defendant "can readily see therefore that we are not pressing you to purchase these labels, and that if you are going to purchase them you will have to make arrangements with Mr. Mittelstadt directly as to how and when you are to purchase them." Plaintiff's letter of June 1, 1949, is corroborative of the telephone conversation of May 27, 1949, between Mr. Opler and Mr. DeVita. It will be recalled that Mr. Opler testified that in this conversation Mr. DeVita told him that the labels were shipped on Mr. Mittelstadt's instructions, and that if defendant did not want them it may "return the

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the 1990s, the number of people in the world who are under 15 years of age is expected to increase from 1.1 billion to 1.5 billion. The number of people aged 65 and over is expected to increase from 200 million to 400 million. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion. The number of people aged 15 and over is expected to increase from 3.5 billion to 4.5 billion.

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Abstract

invoice and we will adjust the matter with Mr. Mittelstadt at a later date." Each of the parties to the conversation said "Okay." The testimony of Mr. Opler was not contradicted and is supported by the documentary evidence. We are convinced that the court was in error in finding against the defendant as to the 486,000 labels.

We believe that the defendant should pay plaintiff for the labels it ordered. The record shows that on February 14, 1949, plaintiff offered to sell defendant a stock of 200,000 printed labels "which require only some imprinting as to ingredients and net weight text plus required varnishing" at \$3.00 per thousand. Plaintiff asked defendant to note that the quoted price was 50 cents more per thousand than "the other milk and bitter chocolate labels" on which prices were quoted to defendant on January 5, 1949. Defendant's order No. 8568 for 200,000 Dama Almond Milk Chocolate Labels, imprinted and varnished, specified a price of \$2.50 per thousand, F.o.b. New York. In their briefs the parties assume that the price of the labels was \$3.00 per thousand. As the invoice for these labels was in the sum of \$615.50, we presume that more than 200,000 labels were shipped by plaintiff to defendant. The labels ordered by defendant under its order No. 8568 were not mentioned in the telephone conversation of May 27, 1949, or in plaintiff's letter of June 1, 1949.

For the reasons stated the judgment of the Municipal Court of Chicago is reversed and the cause remanded with directions to enter judgment in favor of plaintiff and against defendant for \$615.50.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Friend, J., and Niemeyer, J., Concur.

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EDWARD A. MURRAY, doing business
as MURRAY COAL COMPANY,
Plaintiff - Appellee,

v.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

JOHN L. SHERIDAN and FRANCES M.
SHERIDAN, ROBERT J. BLAKE and
MARGARET BLAKE,
Defendants- Appellants.

347 I.A. 180¹

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On August 11, 1942, the Circuit Court of Cook County entered a judgment for \$1,507.50 in favor of Edward A. Murray, doing business as Murray Coal Company, and against John L. Sheridan and Frances M. Sheridan. A writ of fieri facias was returned unsatisfied. On September 26, 1942, plaintiff filed a complaint in the Superior Court of Cook County against the Sheridans, Robert J. Blake and Margaret Blake and alleged that on September 17, 1935, the judgment debtors were the owners of real estate commonly known as 8124 South St. Lawrence Avenue, Chicago, improved with a residence, and occupied by the judgment debtors; that on that date the judgment debtors executed and delivered a mortgage on the premises to the Home Owners' Loan Corporation to secure an indebtedness of \$6,939; that on January 24, 1937, the judgment debtors made a purported conveyance to Robert J. Blake by quit claim deed; that the Blakes are husband and wife; that the note upon which the judgment was entered was dated July 17, 1935, and was due one year after date; that it was in default at the time of the making of the deed to

the Blakes; that the conveyance to Blake was for the purpose of hindering, delaying and defrauding plaintiff and other creditors; and that the judgment debtors "are still the owners of some beneficial interest" in the real estate. Plaintiff sought discovery and also asked that the judgment debtors be decreed to pay him the amount of the judgment, plus interest, and that they be decreed to apply on the judgment any money, property or equitable interest belonging to them, or held in trust for them, or in which they are in any way interested.

On February 14, 1950, defendants filed an answer, which was verified by their attorney who took oath that he "is familiar with the matters and things in said answer contained, and that same are true in substance and in fact." In the answer defendants aver that there was a good and valuable consideration for the conveyance from the judgment debtors to Blake, and denied that the conveyance was made without consideration or for the purpose of hindering, delaying or defrauding plaintiff. Defendants stated the fact to be that the judgment debtors received from Blake the sum of \$5,000 on May 1, 1929; that on that date Sheridan delivered to Blake a judgment note for that amount due one year after date; that on July 1, 1930, the note was returned to Sheridan with a notation that it had been canceled by payment; that on July 1, 1930, there was a mortgage on the real estate for \$8,000, payable to Fred J. Wahr and wife, which mortgage was in default; that on July 1, 1930, the Sheridans in order to protect Blake, executed a warranty deed to him; that on

March 22, 1932, Blake and his wife conveyed the real estate to the judgment debtors "so that they could try to negotiate a new loan"; that on September 17, 1935, the loan was negotiated through the Home Owners' Loan Corporation for \$6,939; and that on January 24, 1937, the Sheridans conveyed the real estate by quit claim deed to Robert J. Blake "as security for the \$5,000" he advanced John L. Sheridan on May 1, 1929.

On April 12, 1950, plaintiff filed an amended and supplemental complaint alleging that on April 6, 1950, a judgment of revival of the judgment entered August 11, 1942, was entered in the Circuit Court, and setting out purported admissions by the defendants in their testimony before a master in chancery. This pleading also stated that by their answer defendants admitted that the deed from the judgment debtors to Blake dated January 24, 1937, was not an absolute conveyance, but was intended to be and was a mortgage to secure an alleged indebtedness of \$5,000 due to Blake. Plaintiff prayed that the court decree that the deed of January 24, 1937, was not an absolute conveyance but a mortgage for the purpose of securing an indebtedness alleged by the defendants to have been incurred on or about May 1, 1929, "provided, however, that the question of the ~~existence~~ existence, amount and validity of said mortgage indebtedness be not adjudicated at this time or in this cause, but be reserved for future adjudication at such time and in such proceeding as such questions shall be properly raised by appropriate pleadings and issues." In

1. The first of these is the fact that the
theoretical model of the system is
based on a set of assumptions which
are not always valid in practice.
2. The second is the fact that the
model is based on a set of parameters
which are not always known or
measurable.

3. The third is the fact that the
model is based on a set of equations
which are not always solvable.
4. The fourth is the fact that the
model is based on a set of data
which are not always reliable.

5. The fifth is the fact that the
model is based on a set of results
which are not always consistent.
6. The sixth is the fact that the
model is based on a set of conclusions
which are not always valid.

7. The seventh is the fact that the
model is based on a set of hypotheses
which are not always testable.
8. The eighth is the fact that the
model is based on a set of predictions
which are not always accurate.

9. The ninth is the fact that the
model is based on a set of assumptions
which are not always reasonable.
10. The tenth is the fact that the
model is based on a set of conclusions
which are not always justified.

11. The eleventh is the fact that the
model is based on a set of hypotheses
which are not always verifiable.
12. The twelfth is the fact that the
model is based on a set of predictions
which are not always precise.

their answer defendants stated that the note for \$5,000 was canceled, in consideration of which the judgment debtors executed a warranty deed to the Blakes, and that the conveyance was in good faith and for a valuable consideration. They denied they were guilty of any fraud.

The master found the issues in favor of plaintiff. Defendants' objections to the master's report which were permitted to stand as exceptions, were overruled and a decree entered that the deed from the judgment debtors to Blake dated January 24, 1937, was not and is not an absolute conveyance to him and is in the nature of a mortgage from them to Blake for the purpose of securing an indebtedness alleged by defendants to have been incurred on or about May 1, 1929, and to have been then and there due and owing from the Sheridans to Blake; that the question of the existence, amount and validity of the mortgage indebtedness be not adjudicated, but be reserved for further adjudication at such time and in such proceeding and as such question shall be properly raised by appropriate pleadings and issues; that the judgment debtors be adjudged to be the owners of the real estate subject to the first mortgage to the Home Owners' Loan Corporation and to the conveyance in the nature of a mortgage to Blake for whatever sum may be due from the judgment debtors to Blake thereunder; and that the costs be taxed against the defendants. Defendants, Robert J. Blake and Margaret Blake, appealed to the Supreme Court, which court (411 Ill. 65) found that it did

not have jurisdiction and transferred the case to this court. Defendants ask that the decree be reversed with directions that the chancellor find that the "transaction between Sheridan and Blake should be regarded as an absolute sale and that Blake is the owner of the property."

Plaintiff made out his case by admissions in the pleadings, introduction of the Sheridan-Blake deeds, some documentary evidence and the adverse examination of Blake and Sheridan. Defendants did not offer any evidence. We have read the pleadings, exhibits and the transcript of the testimony and conclude that the deed to Blake was not intended to be an absolute deed of conveyance, but a mortgage or security. It will be noted that the residence on the premises has been occupied by Sheridan and his family since he acquired it in 1928; that Blake has not paid any real estate taxes on the property; that since 1930 he has not collected any rents or realized any profits therefrom; and that he has not made any payments on the mortgage. All insurance premiums and the cost of repairs have been borne exclusively by the Sheridans. We are satisfied that the findings of the decree are amply supported by the record. Therefore, the decree of the Superior Court of Cook County is affirmed. ✓

DECREE AFFIRMED.

Friend, J., and Niemeyer, J., Concur.

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347 I.A. 180

METROPOLIS THEATRE COMPANY, a New York corporation, and JOHN R. THOMPSON, JR., HENRY M. HENRIKSEN and HARRIS TRUST AND SAVINGS BANK, as Trustees under the last will and testament of JOHN R. THOMPSON, deceased, and as trustees under the Exhibit B agreement dated June 30, 1931 but actually executed January 13, 1933, and JOHN R. THOMPSON, JR., individually,

Appellants,

v.

L. H. BARKHAUSEN and RANDOLPH BOHRER, individually and doing business as The Doubleby Co., HERMAN BRASH, individually and as Trustee for L. H. Barkhausen and Randolph Bohrer, under agreement dated January 29, 1946, ORIENTAL ENTERTAINMENT CORPORATION, an Illinois corporation, ESSANESS THEATRES CORPORATION, a Delaware corporation, EDWARD BLACKMAN, EDWIN SILVERMAN, 32 WEST RANDOLPH CORPORATION, an Illinois corporation, CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, a national banking corporation, as Trustee,

Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

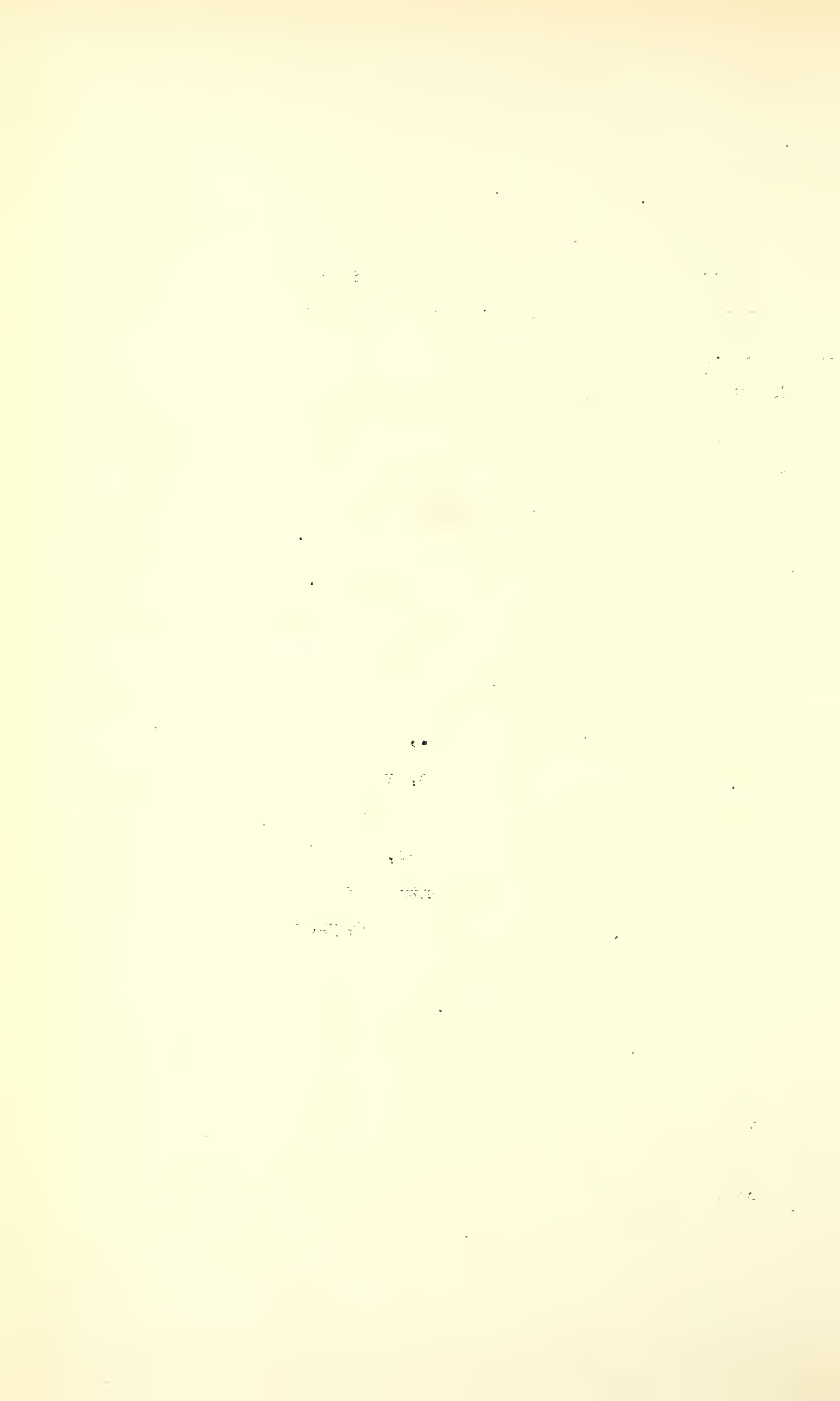
Metropolis Theatre Company (hereinafter called Metropolis), the percentage-rent lessor of one of two adjoining parcels of land, and John R. Thompson, Jr., Henry M. Henriksen and Harris Trust and Savings Bank, as trustees (hereinafter referred to as Thompson trustees), the percentage-rent lessors of the other of the adjoining parcel of land, brought a complaint in equity against defendants, which was subsequently amended, seeking discovery, an accounting, injunctive relief, the recovery of unpaid balances of percentage-rents, damages for breach of lease covenants, and other relief. The several defendants interposed motions to dismiss

the complaint, supported by affidavits and extensive documents attached as exhibits, to which plaintiffs filed counter-affidavits. Upon consideration of these pleadings, affidavits, counteraffidavits and exhibits, the court made detailed findings of fact, granted the motions, and entered a decree dismissing the complaint, as amended, from which plaintiffs appeal.

Metropolis and Thompson trustees are the respective ground lessors of two parcels of real estate on which has been erected a twenty-two story office building and theater known as the Oriental Theatre Building. The original ground leases between plaintiffs and the original ground lessee, United Masonic Temple Corporation, were executed in April 1924. On September 15, 1935 the interest of the ground lessee was acquired by 32 West Randolph Corporation (referred to as Randolph). Both before and after the acquisition by Randolph, the Oriental Building experienced financial difficulties, and finally, in 1939, both ground leases were amended to provide for certain fixed rentals and for additional rentals based on varying percentages of the ground lessee's net income from the building. Thereafter Randolph continued to operate the building until January 29, 1946, when it executed and delivered to one Herman Brash, as trustee under a land trust, all of the lessee's interest under the ground leases. Barkhausen and Bohrer, doing business as The Doubleby Company, acquired the beneficial interest in that land trust. After challenging the validity of that assignment for more than three years, plaintiffs finally acknowledged Brash to be the lessee under

the two ground leases. Continental Illinois National Bank and Trust Company of Chicago (Continental) is the trustee under a mortgage trust deed covering the ground leaseholds, and pursuant to which Randolph negotiated a substantial issue of bonds.

Concurrently with the execution of the original ground leases in April 1924, the United Masonic Temple Corporation subleased the theater portion of the property to Balaban and Katz Corporation at a flat yearly rental. This theater sublease was expressly recognized and stated to be superior to the mortgage secured by the ground leaseholds. In 1932 the theater sublease was assigned to a wholly owned subsidiary of Balaban and Katz, and ~~xxx~~ four years later was modified by agreement with Randolph. In September 1938 Randolph organized Southern Theatre Properties, Inc., an Illinois corporation, as its subsidiary and nominee, to which it (Randolph) assigned the theater sublease. The corporate nominee held the sublease for several months, and on November 1, 1938 entered into a supplementary indenture which basically modified the sublease. Nine days later, on November 10, 1938, Metropolis, the ground lessor, executed a document recognizing the tenancy of the theater sublessee, agreeing to be bound by the terms of the theater sublease in the event that the ground lease should be terminated for any reason. Thompson trustees at the same time agreed to be bound by the terms of the theater sublease in the event of default in the ground lease, of which they were lessors. In the latter part of 1938 the capital stock of Southern Theatre Properties, Inc.,



was transferred to a theater-operating concern known as Jones, Linick and Schaefer, and under such control Southern Theatre Properties, Inc., proceeded to carry on the operation of the theater under the terms of the theater sublease until 1941. No prohibition against the assignment of the theater sublease appears in either of the ground leases, and no consent of the ground lessors is required for the assignment of the sublease, either under the terms thereof or ^{of} the ground lease. The only limitation with respect to the theater is that the terms of the sublease should not be changed adversely to the ground lessors, and no new sublease should be granted to the theater without the consent of the ground lessors.

It appears that in 1940 Southern Theatre Properties, Inc., experienced financial reverses in the operation of the Oriental Theatre, and by February 1941 was heavily in default under the theater sublease. Accordingly, on February 25, 1941, Southern Theatre assigned all of its interest in the theater sublease to Miss I. V. Cage, a nominee of Randolph, who shortly thereafter entered into an operating agreement with Randolph, which provided that Randolph might operate the theater and retain the entire income therefrom for itself for a period of four years upon payment to Cage of \$100.00 per month. The income so retained was to be in lieu of the rental reserved. During the early part of the operation period the income was less than the rent reserved, and during the latter part of the period it greatly exceeded such reserve rental. The agreement provided that at the end of the four-year period Cage might assume the theater operation under the terms of the

The first of these is the fact that the
theoretical model of the system is based on
the assumption that the system is in a state of
equilibrium. This is not always the case, and
the system may be in a state of non-equilibrium.

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is based on the assumption that the system is
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the system may be in a state of non-equilibrium.

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theater sublease, provided she deposited \$50,000.00 in cash to guarantee observance of the sublease covenants. The assignment of the theater sublease to Cage was made at the instance of Randolph, but the assignor was not relieved of its obligations, either for the rent then in default or any future rentals, nor was any other consideration given. C. F. Eigelsbach and Company, public accountants designated in the ground leases to audit the accounts of the building, reported the Cage assignment and operating agreements in their audit reports. Theater licenses were continuously taken in the name of Cage, and the operating agreement was in other respects fully observed.

In accordance with the terms of the operating agreement of April 15, 1941, Cage, on December 8, 1945, assigned all interest of the lessee in the theater sublease to Oriental Entertainment Corporation (Oriental) which immediately deposited \$50,000.00 to guarantee performance of the theater sublease, and proceeded to take over the operation of the theater. Oriental had been organized by defendants Barkhausen and Bohrer, and the stock of the company was issued to Barkhausen and Bohrer, Blackman and Silverman, or their relatives. Silverman had long been engaged as a theater operator and was an officer of Essaness Theatres Corporation, which was retained by Oriental to manage the theater.

The assignment by Cage to Oriental was part of a transaction by which the interests of Randolph, as lessee under the two ground leases and as lesser under the theater sublease, were assigned to Brash, as trustee under the land

trust for the benefit of Barkhausen and Bohrer. The land-trust agreement gave the beneficiaries control of management, the right to rents and proceeds, and authority to direct the trustee with respect to disposition of title to the property, and provided that the beneficiaries should indemnify the trustee against personal expense.

Since January 29, 1946 Oriental has operated the theater, ~~paying~~ to Barkhausen and Bohrer in the management of the building, the rent reserved in the theater sublease, and Barkhausen and Bohrer have, in turn, accounted to plaintiffs, as ground lessors, for the income from the theater sublease and other operations of the building, in accordance with the fixed and percentage-rental provisions of the ground leases. The obligations under the ground leases were assumed by Brash, as trustee and individually, with the written approval of Barkhausen and Bohrer, and Brash, as alleged in the complaint, does not individually or as trustee, have funds to pay "plaintiffs' rent."

On April 15, 1946 certain creditors filed a petition for reorganization of Randolph which alleged as an act of bankruptcy that the transfer of the theater sublease from Cage to Oriental was a transfer with intent to hinder, delay and defraud the creditors. Issue having been joined on the questions of insolvency and the acts of bankruptcy, an order was entered on April 29, 1946 enjoining all persons from disposing of the assets of the debtor, other than in the ordinary course of business, and the matter was referred for

hearing and report to Joseph F. Elward as special master. The petitioning creditors sought an order enjoining the ground lessors from forfeiting the ground leases, and copies of the application for injunction were served upon plaintiffs, the ground lessors. On April 29, 1946 an injunction was issued, as prayed, and on that same date plaintiffs appeared in the reorganization proceeding and secured an order from the United States District judge requiring all notices to be served upon them. Counsel for plaintiffs thereafter attended substantially all hearings before the special master. In June 1946 plaintiffs filed suggestions praying for the right to file a plenary suit to terminate the ground leases, which specifically assigned the alleged invalidity of the assignment of the theater sublease as a breach of the ground leases, giving rise to the right of termination. Thereafter hearings proceeded on the reorganization petition until October 1946, when plaintiffs filed petitions in the reorganization proceeding which described them as creditors of Randolph and prayed for (1) permission to institute plenary proceedings for the termination of the ground leases, and (2) a rule to show cause why Barkhausen, Bohrer, Brash, Oriental, Silverman and others should not be held in contempt of court for failing to abide by the injunctional order of April 29, 1946. In those petitions plaintiffs alleged that they could not accept rent from Brash, Barkhausen and Bohrer without prejudicing their right to claim (1) that the theater sublease was invalid, and (2) that its assignment by Cage to Oriental

1. The first part of the report is a general statement of the purpose and scope of the study.

2. The second part is a description of the methods used in the study.

3. The third part is a description of the results of the study.

4. The fourth part is a discussion of the results and their implications.

5. The fifth part is a conclusion and a list of references.

6. The sixth part is a list of appendices.

7. The seventh part is a list of figures and tables.

8. The eighth part is a list of footnotes.

9. The ninth part is a list of acknowledgments.

10. The tenth part is a list of references.

11. The eleventh part is a list of appendices.

12. The twelfth part is a list of figures and tables.

13. The thirteenth part is a list of footnotes.

14. The fourteenth part is a list of acknowledgments.

15. The fifteenth part is a list of references.

16. The sixteenth part is a list of appendices.

17. The seventeenth part is a list of figures and tables.

18. The eighteenth part is a list of footnotes.

19. The nineteenth part is a list of acknowledgments.

20. The twentieth part is a list of references.

21. The twenty-first part is a list of appendices.

22. The twenty-second part is a list of figures and tables.

23. The twenty-third part is a list of footnotes.

24. The twenty-fourth part is a list of acknowledgments.

25. The twenty-fifth part is a list of references.

26. The twenty-sixth part is a list of appendices.

27. The twenty-seventh part is a list of figures and tables.

28. The twenty-eighth part is a list of footnotes.

29. The twenty-ninth part is a list of acknowledgments.

30. The thirtieth part is a list of references.

was a breach of the ground leases. The master had hearings first on the issue of contempt, and then on the question of the plaintiffs' right to bring a plenary suit for forfeiture. In the course of those proceedings evidence was introduced establishing that plaintiffs had advised the petitioning creditors in the reorganization proceeding to file an amendment to the petition claiming, as an additional act of bankruptcy, a general assignment for the benefit of creditors, and that the ground lessors had counseled with the attorneys for the petitioning creditors, participated in the preparation of their documents and supplied them with legal briefs. Master Elward found that the ground lessors might bring a plenary suit, subject to specific limitations, and accordingly the case entitled Metropolis Theatre Company v. Barkhausen was filed on May 20, 1947 in the United States District Court for this district. The complaint prayed for forfeiture of the Metropolis Ground lease and a ruling that the theater sublease was extinct and invalid.

Hearings on the reorganization petition continued until early in 1948, and voluminous testimony and exhibits were introduced in evidence. At the close of the petitioning creditors' case Randolph moved to dismiss the petition. After the submission^{of} briefs Master Elward, on December 15, 1948, made his report on the issue of the approval of the petition for reorganization. His report found all the issues, including those with respect to the alleged acts of bankruptcy, in favor of Randolph; and he specifically found that no invalidity existed in the assignment of the theater sublease from age

to Oriental in 1945, that lease having been kept alive by the assignment in 1941 from Southern Theatre Properties, Inc., to Cage; and that Randolph kept the theater sublease alive in the exercise of reasonable business judgment in order to preserve the priority of the theater sublease under the lien of the mortgage indenture. Judge William J. Campbell of the United States District Court, by order of April 13, 1949, approved the report of Master Elward.

The principal theory upon which the complaint seeks to impose liability upon defendants is that the theater sublease became extinct in 1941 and could not be validly assigned to Oriental in December 1945. From this premise, plaintiffs argue that all income from the theater was income to the ground lessee, accountable under the percentage provisions, and an additional claim is made for deduction of what are alleged to be excessive management fees. The chancellor declined to accept this theory, and we think properly so. The complaint and attached exhibits clearly establish an intention to maintain the theater sublease as a valid, subsisting and operating instrument, as indicated by the following circumstances set forth in plaintiffs' pleadings: (1) on February 25, 1941 the theater sublease was assigned by Southern, the then theater sublessee, to Cage, and the fact that it was assigned, rather than terminated or permitted to lapse, shows an intention to keep it alive and subsisting; (2) the designation of Cage as nominee of Randolph demonstrates an intention to keep the sublease

operative and to prevent an abandonment, surrender or merger; (3) the theater sublease was assignable without the consent of the plaintiffs; neither of the ground leases nor the theater sublease limits the class of persons to whom the theater sublease might be assigned, nor do any of these instruments require consent by or notice to the ground lessors of any such assignment; (4) the theater sublease was in existence at the time that the percentage-rental provisions were added to the ground leases, and it was clearly within the contemplation of the parties, including plaintiffs, that the theater portion of the premises would be operated under a sublease, and that the percentage rent payable to the ground lessors would be computed upon the basis of the rent reserved in the theater sublease and not upon the entire operating income of the theater.

Under the pleadings heretofore set forth, the facts pertinent to the assignment of the theater lease to Cage are undisputed. Southern Theatre Properties was in default in the payment of rent under the sublease. Randolph, the sublessor, desired to keep the theater sublease alive until a new operator could be obtained for the theater. The theater sublease was paramount to the lien of the leasehold bond issue, and its terms had been approved and its existence expressly recognized by the ground lessors. An arrangement was therefore entered into between Randolph and Southern whereby the theater sublease was assigned, on February 25, 1941, to Cage, a nominee of Randolph. That no surrender or

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merger was intended is confirmed by the fact that the assignment did not relieve Southern of its obligations of the theater sublease for the rent theretofore accrued or thereafter accruing. There is the additional circumstance that shortly after the assignment Cage entered into an operating agreement with Randolph under which the latter was given the right to operate the theater until December 31, 1945 upon payment to Cage of \$100.00 per month. That agreement expressly provided that the theater sublease was to be continued in existence during this period, and Cage was given the election to terminate the sublease on December 31, 1945 or take over the operation of the theater at that time upon depositing the sum of \$50,000.00 as a guarantee of performance of the theater sublease. The following documents attached to the complaint confirm the intention to make a valid assignment of the sublease to Cage, and to keep that sublease alive: the instrument of assignment of the sublease to Cage, dated February 25, 1941, the operating agreement of April 15, 1941 expressly providing that the sublease shall continue in full force and effect, canceled checks showing that each month Cage was paid \$100.00 in conformity with the operating agreement, city licenses for the operation of the theater from January 1, 1941 to December 31, 1945 issued to Cage, every audit report from 1941 through 1945 recording the assignment of the sublease to Cage and stating that the sublease remained in full force and effect, and the minutes of Southern authorizing the assignment, disclosing the legitimate reasons therefor and

showing that Southern continued to remain liable as sublessee under the sublease.

Under the current weight of authority in this State the intention to make a valid assignment and keep the sublease alive as a separate and independent leasehold, is controlling on the question of abandonment, surrender and merger; and in the instant proceedings we find no document, no act during this entire period which contradicts such intent. Defendants cite two cases in point. In the first of these, Wechter v. Chicago Title and Trust Company, 385 Ill. 111, the Title and Trust Company as trustee held the fee to certain property, subject to a ninety-nine year lease, under which a building had been erected. Upon default the trustee instituted proceedings to foreclose its landlord's lien on the leasehold estate. Decree of foreclosure was entered, and the leasehold estate was purchased for \$15,000.00 by a newly formed corporation. All of the capital of the corporation was supplied, and all of its stock owned, by the trustee, which was simply a nominee and recognized as such by the court. In a suit instituted by the beneficiaries of the trust claiming that the ninety-nine year lease had terminated by merger, and that accordingly the land trust had, by its terms, expired, the court held that no merger took place. In both the Wechter case and in these proceedings, a leasehold was transferred to a nominee of the holder of a paramount estate, in the Wechter case for the purpose of avoiding federal income-tax hardship to the beneficial owners of the fee, and in the instant proceedings to preserve the priority of the theater

sublease over a mortgage indenture. In both situations the intention to prevent a merger was clear, and the Wechter case holds that such intention must be given effect as a matter of law.

Again, in Chicago Title and Trust Company v. Wolchinovsky, 326 Ill. App. 194, a decree of foreclosure and sale, under a first mortgage, was entered with respect to certain property. The first-mortgage bondholders were entitled to receive the net income from the premises during the period of redemption. Brainin, a first-mortgage holder, used a nominee to foreclose a second mortgage on the premises and to obtain a master's deed. In a subsequent suit by the nominee to obtain possession of the premises, the contention was made that the first-mortgage bonds owned by Brainin merged with the title which he acquired through his nominee, and that accordingly Brainin should be excluded from participating in the net income of the property during the period of redemption. The court held that the use of the nominee disclosed an intention to prevent a merger, and pertinently said that "on the question of merger, it is well settled in this State that merger is a question of intention, and that no merger of a lesser with a greater estate will result unless it is shown that the party who owns the two estates actually intended that a merger should result." Plaintiffs cite numerous decisions on this phase of the case, but we do not find any in which a merger was held to have taken place contrary to the established intention of the parties in whom the two estates were vested. It may be conceded, of course, that under the well accepted rules, mergers are not favored in

1. The first step is to identify the problem. This involves understanding the current situation and what needs to be changed. 2. The second step is to set goals. These should be specific, measurable, achievable, relevant, and time-bound. 3. The third step is to develop a plan. This involves identifying the resources needed and the steps to be taken. 4. The fourth step is to implement the plan. This involves putting the plan into action and monitoring progress. 5. The fifth step is to evaluate the results. This involves comparing the actual results with the goals and making adjustments as needed.

equity, and that the intention of the parties to accomplish or prevent a merger will be given effect except where to do so would result in fraud or injustice. Since in the instant complaint there are no charges of fraud or misconduct, the decisions cited by plaintiffs are inapplicable.

After defendants' motions to dismiss had been exhaustively argued, both orally and in briefs, the chancellor took the matter under advisement and subsequently, when the order of dismissal was entered, made an oral statement setting out the grounds for his order; he held, inter alia, that the leasehold interest under the theater sublease was never abandoned, surrendered or merged; that the contemporaneous documents evidenced an intent not to abandon, cancel or merge the theater sublease; and that the finding of the United States District Court in the reorganization proceeding that the theater sublease was valid and subsisting, and was properly assigned, first to Cage in 1941, and to Oriental in 1945, created an estoppel by verdict against plaintiffs. It is urged by plaintiffs that this finding in the bankruptcy proceeding was not a necessary finding of fact but, as heretofore stated, the issue had been raised both by the petition for reorganization and by the plaintiffs in the amendment to the petition which they devised, and in their own petitions. Creditors in the bankruptcy proceeding had alleged as an act of bankruptcy that the transfer of the theater sublease was a transfer with intent to hinder, delay and defraud creditors, and therefore it became necessary for the court to decide whether the Cage assignment was valid. The United States Court of Appeals

determined that plaintiffs were parties to those reorganization proceedings and, as such, they are bound by the finding and barred from relitigating it. ✓

A secondary theory arises under the amended complaint. The original complaint charged that the theater sublessee had "abandoned and surrendered possession of the theatre premises to Randolph, and surrendered to Randolph its entire leasehold estate, which abandonment and surrender were accepted by Randolph." On June 13, 1951, two months after the complaint had been dismissed by the chancellor, plaintiffs amended their complaint to allege an implied covenant in the ground leases against the operation of the theater by the ground lessees at a profit to themselves. Defendants' motions to dismiss were, by order of the chancellor, permitted to stand to the amended complaint, and an order was entered dismissing the complaint as amended. Under the amended complaint plaintiffs seek to add the theory that a covenant is to be implied in the ground leases barring profit by the ground lessee in any of the theater operations, either as operator, stockholder or otherwise. It is urged, in support of this theory, that the successive lessees owed an obligation of good faith to their landlords so to use the leased property as to obtain the greatest revenue possible out of the leased premises for both themselves and their landlords; and their counsel argue that a percentage-lease tenant may not lease the principal income-producing part of the leased premises to himself at a rental which will result in a profit to himself at the expense of his landlord; that a percentage-lease tenant has the

do
obligation to/all he reasonably can to increase the income from the leased property for the benefit not only of the tenant but also of the landlord; that this duty is implicit in a percentage lease, and no express covenant is necessary; and that there is equally implicit in every contract, including a percentage lease, a requirement that the parties to the contract act toward one another in good faith.

The complaint as originally filed contained no allegations in support of such a theory; it was clearly an afterthought. The complaint shows that the amendments to the ground leases agreed upon by plaintiffs and Randolph on November 1, 1939 recognized the existence of the theater sublease and contained express covenants with respect thereto which provided only that the lessee would not, without the plaintiffs' consent, alter the then existing theater sublease to the detriment of the plaintiffs, or make a new theater sublease. As already stated, there is nothing in the ground leases or in the theater sublease restricting the assignability of the theater sublease or limiting the class of assignees to whom an assignment could be made. It was always within the contemplation of the ground lessors that the theater portion of the premises would be operated under the theater sublease, and that only the rental reserved in that sublease would be included in the ground lessee's income for the purpose of computing the percentage rent payable to plaintiffs. Under the belated amendment to the complaint, plaintiffs seek additional percentage rent on the theory that

an implied covenant prevents Oriental from operating the theater. Implied covenants are established only to effectuate the intention of the parties. To imply such a covenant in the face of the express provisions of the ground leases and the continuous recognition of the existence of a theater sublease, would be to rewrite the ground leases in a manner entirely inconsistent with the intention of the parties; this the courts have steadfastly declined to do. Cousins Inv. Co. v. Hastings Clothing Co., 45 Cal. App. 2d 141, 113 P.2d 878; Cities Service Oil Co. v. Taylor, 242 Ky. Rep. 157, 45 S.W. 2d 1039. The cases cited by plaintiffs in support of their theory are distinguishable in that the implied covenants therein established pertained to obligations intended and contemplated by the parties and were not inconsistent with the express provisions of their written agreements. We find no cases where the subject matter of the covenant implied had been dealt with in the express provisions.

The chancellor also found that the audit reports fully disclosed to plaintiffs both the assignment of the sublease and the supplemental operating agreement; that by accepting the rents with this knowledge from 1941 through 1945, they were barred and estopped from challenging the assignment ~~of~~ validity of the theater sublease; that the tender of \$810,902.11 on May 17, 1949 by Barkhausen and Bohrer to plaintiffs, and the acceptance of that amount, constituted a complete liquidation of all rental and other claims of the plaintiffs to date. These findings are predicated upon tenders of rent, rejections thereof, and final

acceptance. It appears from the exchange of letters attached to the complaint and supplemented by affidavits that a controversy as to the validity of the theater sublease had continued between Barkhausen and Bohrer for more than three years. Finally, in May 1947, plaintiffs accepted the tender of \$810,902.11. In view of the existence of the controversy, the finality of the tender and the understanding of plaintiffs that it was in full payment, constituted an accord and satisfaction, and removed any doubt as to the landlord-tenant relationship or as to the validity of the theater sublease.

Since all of the plaintiffs' other claims with respect to the liability of the various individuals and corporate defendants, as well as claims for an accounting, are predicated upon the two underlying theories herein considered, it will be unnecessary to discuss them. We think the chancellor properly dismissed plaintiffs' complaint as amended for failure to state a cause of action, and the order or decree of the Superior Court is therefore affirmed.

ORDER OR DECREE AFFIRMED.

Burke, P. J., and Niemeyer, J., Concur.

[illegible]

28728 A

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

February Term, A. D. 1952

Term No. 52 F 12

Agenda No. 6

347 I.A. 181⁷

KENNETH WILLIAMS, a Minor, by)	
ELBERT WILLIAMS, His Father)	
and Next Friend, and ELBERT)	
WILLIAMS,)	
)	
Plaintiffs-Appellees,	)	Appeal from the
	)	Circuit Court
vs.	)	of Williamson
	)	County, Illinois.
)	
RALPH NORMAN,)	
)	
Defendant-Appellant.)	

CULBERTSON, P. J.

This is an appeal from a judgment of the Circuit Court of Williamson County, Illinois, in the sum of \$3750.00, in favor of Appellee KENNETH WILLIAMS, a minor (hereinafter called the minor plaintiff), and \$500.00 in favor of Appellee ELBERT WILLIAMS, his father, as against Appellant, RALPH NORMAN (hereinafter called defendant).

The minor plaintiff, Kenneth Williams, a fifteen-year-old boy, filed an action through his father and next friend for personal injuries sustained by the boy, and for medical expenses

and loss of services sustained by the father, which resulted on October 9, 1950 when the boy was struck by defendant's automobile. The minor plaintiff was walking in an easterly direction on the south side of a four-lane highway and defendant was driving his car in an easterly direction on the same south side, or right-hand side of the street, approaching the plaintiff from the rear. The boy was facing east, with his back to the traffic when he was struck by the automobile.

On appeal in this Court defendant has filed a 114 page brief, assigning 31 specific points as basis for reversal, in a case which after analysis seems relatively simple and which, in the interest of economy of energy and fairness to the Court on appeal, should have been consolidated into a shorter brief and fewer points for consideration. Some of the matters raised are repetitious and others are collateral to the issue. It would unduly extend this opinion to treat and argue all the various points which have been raised and all the many detailed contentions which are asserted in the brief of plaintiff.

The record in this cause shows that a specific interrogatory was submitted by counsel for defendant. Counsel for plaintiff in argument to the jury stated specifically that a special interrogatory had been submitted by the defendant through his attorney, and then proceeded to present

an argument to the jury as to what should be done with such interrogatory. Objection and motion for a mistrial were made and denied at such time. While it is proper for an attorney to argue the facts of the case, and discuss the evidence for the purpose of convincing the jury that under the evidence the interrogatory should be answered either in the affirmative or the negative, as the case may be, it was highly improper for the attorney to specify that the interrogatory had been prepared or submitted by defendant or his attorney. A jury should always be advised that instructions and interrogatories come from the Court, not from counsel (HIMROD COAL CO. vs. BECKWITH, 111 Ill. App. 379). The record also discloses improper and prejudicial argument by counsel for plaintiff, illustrative of which is his argument as to what defendant's counsel would have asked in the way of damages had he suffered a broken leg. We are persuaded that the fair and impartial trial to which defendant was entitled under the law was not received by him.

We are not unmindful of the many other unusual developments referred to in the course of the briefs and shown by the abstract of record in this case, and are making no comment on such matters on the assumption that the same circumstances will not develop on a retrial of this cause.

This cause will therefore be reversed
and remanded to the Circuit Court of Williamson
County, Illinois, for a new trial.

Reversed and remanded.

Bardens, J., and Scheineman, J., concur.

(Publish Abstract only)

FILED

MAY 14 1952

David J. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

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45516

JULES P. DORETTE,

Appellee,

v.

ALFEO ANGELLOTTI,

Appellant,

and

D. RAYMOND YODER,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

347 I.A. 181²

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought this action against Joseph Angellotti and Alfeo Angellotti, as owners and operators of a motor truck, and Raymond Yoder, as the owner and operator of an automobile, charging them with specific negligence and a violation of certain sections of the Motor Vehicle Act (Ill. Rev. Stat., Ch. 95-1/2) in the operation of their respective vehicles, resulting in injuries to the plaintiff. A third trial with a jury (two previous juries having disagreed) resulted in a verdict of \$9,000 for plaintiff against defendants Yoder and Alfeo Angellotti, and judgment was entered upon the verdict. The death of Joseph Angellotti was suggested and the cause dismissed as to him. Alfeo Angellotti served notice of appeal but abandoned it. The cause is here only on appeal of defendant Yoder.

There is a sharp conflict in the evidence as to the manner and location of the accident. Plaintiff's evidence tended to prove that the accident occurred in the

THE [illegible] OF [illegible]

BY [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

north crosswalk of Irving Park Road at the intersection of Cicero Avenue near the east rail of the northbound streetcar, Irving Park Road running east and west; that there were traffic signal lights at this intersection; that the traffic light was green for east and west traffic; that he walked west across Cicero Avenue, and when he reached the east rail of the northbound streetcar tracks he saw the light changing for Cicero Avenue traffic; that he looked to the south and saw some vehicles crossing Irving Park Road from the south and a truck behind the first vehicle appeared to be pulling over to the east to pass the first vehicle traveling north; that plaintiff tried to move out of the path of the approaching vehicles, but the right front fender of the passenger car operated by Yoder hit him and spun him around, and as he was falling the front part of the truck driven by Angellotti struck him; and that he heard no horn or signal.

The evidence on behalf of Yoder tended to prove that as he came up to the south side of Irving Park Road, he did not see anyone on the street ahead of him; that as he came up to the north rail of the westbound tracks on Irving Park Road, he did not recall seeing anyone walking or crossing from the curb toward the rail; that he saw plaintiff near the rail, about 50 to 60 feet from the curb line; that he came to a stop and sounded his horn; that plaintiff turned and faced his car and took a step back about 2 or 3 feet; that as he shifted gears to start forward, the truck struck him from the rear, forcing his car 30 to 40 feet to the north; and that when he saw plaintiff after the accident plaintiff was slightly south of the entrance to the Sears Roebuck store.

Angellotti testified that he was driving a truck north on Cicero Avenue and came to a stop for the red light at the south side of Irving Park Road, at which time there was a passenger automobile driven by defendant Yoder in front of him; that when the lights changed to green for northbound traffic, Yoder's automobile started up, and he started immediately behind it; that as he crossed Irving Park Road, Yoder's automobile "stopped suddenly in front of him," and when he was about even with the door to the Sears store, approximately 75 feet north of the crosswalk in question, the front end of the truck struck the rear end of Yoder's automobile.

Defendant Yoder seeks a reversal of the judgment upon the following grounds: that plaintiff was guilty of volunteering a statement in the presence of the jury prejudicial to the defendant; that plaintiff's counsel was guilty of prejudicial conduct; that instructions 13, 18 and 24, given for the plaintiff, are erroneous; and that plaintiff's counsel in argument prejudicially informed the jury that defendant was insured.

It appears from the record that upon direct examination plaintiff testified that before the accident in question he had worked in Philadelphia selling beer. He was then asked the following questions: "Q. And prior to that? A. Prior to that I was incarcerated, until they caught the one that did it. Q. Where was that? A. State Prison of Southern Michigan. Q. And you were there how long? A. I was there eleven years." No objection was then made to the questions or answers given. Counsel for Yoder

cross-examined as follows: "Q. Mr. Dorette, were you convicted of murder in the first degree arising out of a robbery where one Julius Harris was killed on November 25, 1933 in Detroit, Michigan? A. Yes, I was until they found the one who did it. Mr. Pretzel: I move the last part of the answer be stricken. I object to it. The Court: Yes it will be stricken. * * * Q. Whereas the matter of fact was you turned state's evidence on the other two fellows who were with you, isn't that the fact? A. No, that is not the fact. Q. The other man's name was George Ruble? A. That is one of the boys, yes. Q. And the other one was Max Maius? A. That is right. Q. That was in connection with the hold-up of a bookie joint, wasn't it? A. Those two fellows you mentioned shot me."

Granting that the direct examination touching the prior conviction and incarceration was improper, defendant cannot now complain, first, because there was no objection made to the questions and answers given on direct examination, (Graham v. Mattoon City Ry. Co., 234 Ill. 483), and secondly, he explored the subject more thoroughly on cross-examination, and undertook to delve into the merits of the crime committed, which was highly improper. Gallagher v. People, 211 Ill. 158. Counsel for Yoder also made the following inflammatory statement in the presence of the jury: "Dorette was shot himself, right in the holdup. Why does he want to talk--two slugs in his body and he wasn't there. * * * Well, you didn't talk all about the man's past. You talked about the one conviction. That doesn't mean the man's past." Whatever right counsel had to complain of the questions and answers

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1. *Phragmites australis* (Cav.) Trin. ex Steud.

Journal of Management Education 30(6)p. 789-806

on direct examination he waived by his own cross-examination and statement made to the jury. Bogart v. Brazee, 331 Ill. 160; Supolski v. Ferguson & Lange Co., 272 Ill. 82; Kuhn v. Epstein, 239 Ill. 555.

The contention as to the prejudicial conduct of counsel involves the direct examination of plaintiff as to his prior conviction. What we have said as to the direct and cross-examination disposes of this part of the contention. The further contention as to the prejudicial conduct of counsel for plaintiff refers to his closing argument to the jury in which he stated: "Ladies and Gentlemen of the Jury, in deciding your verdict in this case, don't for one moment-- I am going to ask you--don't concern yourselves with how the money damages in this case, if you award them, are to be collected." Defendant claims that this argument informs the jury that defendant was insured. We cannot agree with defendant that the statement is equivalent to telling the jury defendant was insured. It is not reasonably susceptible of such construction. The record does not disclose any objection made to the argument, and the complaint cannot be availed of on appeal. Lindroth v. Walgreen Co., 407 Ill. 121, 136.

The 13th instruction given for the plaintiff stated:

"The plaintiff is required to prove his case by the greater weight of the evidence. This does not require the plaintiff to prove any fact beyond a reasonable doubt. A fact is sufficiently proved if the greater weight of the evidence is in its favor."

An instruction substantially in the same form was approved in Reivitz v. Chicago Rapid Transit Co., 327 Ill. 207, 210, and Slovinski v. Beasley, 316 Ill. App. 273, 277.

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We do not regard it erroneous.

Instruction 18 for the plaintiff is identical with the one given in Osinski v. Benson, 323 Ill. App. 562, 572. The same objections made to the instruction in the instant case were made in the case cited, where it was held the giving of such an instruction was not reversible error.

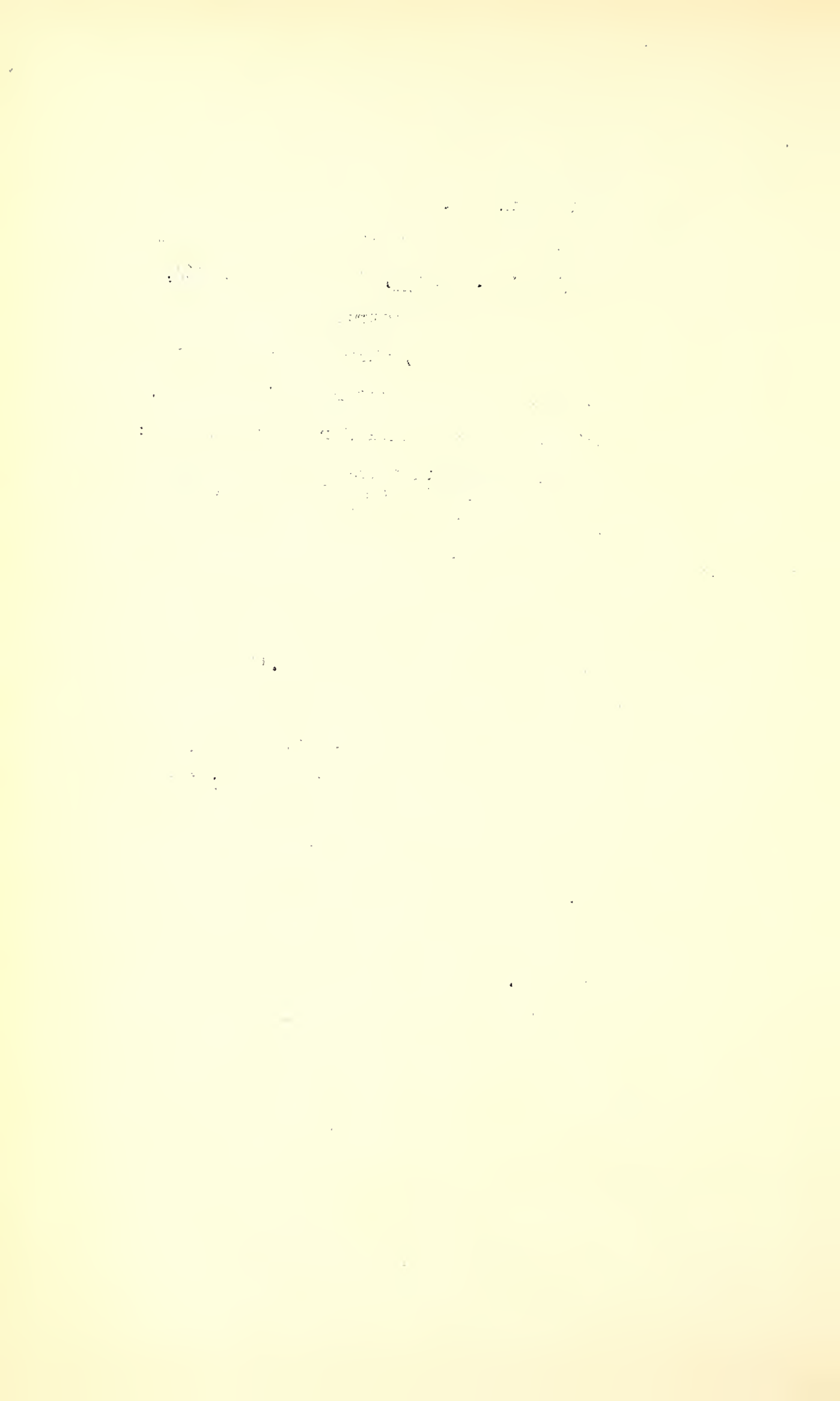
Instruction 24 for plaintiff reads as follows:

"The jury are instructed that there was in full force and effect at the time and place in question a certain statute of the State of Illinois, in words as follows:

"Every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway."

It is urged by defendant that it was error to quote that part of the Motor Vehicle Act which has no application to a crossing controlled by traffic lights; that the quoted part deals only with the duty of a driver to a pedestrian on a roadway other than an intersection controlled by traffic lights; and that since plaintiff claimed that the accident was in the intersection, the court should not have given this instruction.

If the accident occurred approximately 75 feet north of the crossing in question, as claimed by defendants, then this portion of the Motor Vehicle Act quoted in the instruction would apply. There was, as we have indicated, a conflict in the evidence as to where the accident occurred. In an instruction given on behalf of defendant Yoder the entire section of the Motor Vehicle Act relating to crossings



controlled by traffic lights was quoted, as well as the portion of the section embodied in the complained of instruction. Under these circumstances defendant cannot now complain, having given a similar instruction. Grosh v. Acom, 325 Ill. 474; Goldschmidt v. Chicago Transit Authority, 335 Ill. App. 461, 469.

We find no reversible error, and the judgment accordingly is affirmed.

AFFIRMED.

KILEY, P.J. AND LEWE, J., CONCUR.

45536

ADOLPH E. SWANSON,

Appellee,

v.

CHESTER JOHNSON ELECTRIC CO.,
an Illinois corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

347 I.A. 182

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought this action against defendant upon an oral agreement of employment. A jury verdict for \$1500 in favor of plaintiff was returned. Judgment was entered upon the verdict, from which defendant appeals.

The complaint alleged that defendant employed plaintiff in December, 1941, and agreed to pay for his services 15% of its annual profit in each year; that plaintiff was to draw the sum of \$32.00 per week "towards said sum without any liability to repay any part thereof in the event 15 per cent of the profit of said defendant was less than the aggregate annual draw of the plaintiff"; that the difference between said draw and 15% of the annual profit was to be paid to plaintiff at the end of each calendar year; and that the salaries of all of the officers of the corporation were to remain the same as the salaries fixed for the year 1942.

Defendant filed an answer denying the contract as set up in the complaint; alleging that the agreement was to pay plaintiff a straight salary of \$32.00 a week; denying that it agreed to pay him 15% of the annual profit; and that whatever payment was made to plaintiff at the end of each year was in the form of a bonus, resting entirely in the discretion of the defendant.

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A special interrogatory to the jury, submitted by defendant and answered in the affirmative, read: "Did the defendant Chester Johnson Electric Company enter into an agreement with Plaintiff Adolph Swanson in 1941 to pay to said Adolph Swanson for his services a sum equal to fifteen per cent (15%) of the profits of the company?" The interrogatory was silent as to whether the 15% was in addition to the drawing of \$32.00 a week or that the drawing was to be deducted from the 15%.

Contrary to the employment agreement set up in the complaint, plaintiff's evidence was to the effect that the drawing of \$32.00 a week was to be in addition to the 15% instead of deducted therefrom. There is no basis for reconciling the verdict with plaintiff's evidence, even upon plaintiff's theory that the \$32.00 per week was to be in addition to the 15%. Plaintiff terminated his employment at the end of July, 1947. The compensation sought to be recovered is for the seven months. The evidence is undisputed that the profit for the year 1947 was \$15,611.00. Seventwelfths of that amount would be \$9,106.44. Fifteen per cent of the latter amount would be \$1,365.97. The verdict, as noted, was for \$1500.00. The type of claim here made and originally disputed by defendant does not permit an allowance for statutory interest. Even if interest were allowed, it could not be reconciled with the amount of the verdict. Furthermore, the complaint made no claim for interest.

At the conclusion of the trial plaintiff did not amend his complaint to meet the proof. The allegata et

probata must correspond. Pleadings without proof are of no avail on final hearing and, by the same token, proof without pleadings is useless. Roth v. Roth, 284 Ill. App. 71; Bennett v. Gray, 333 Ill. App. 143. The proof for plaintiff in the instant case was not the contract alleged in the complaint.

For the reasons indicated the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

KILEY, P.J. AND LEWE, J. CONCUR.

1. The first part of the paper is devoted to a general discussion of the problem of the existence of solutions of the system of equations

(1)
$$\frac{dx}{dt} = f(x, y, z), \quad \frac{dy}{dt} = g(x, y, z), \quad \frac{dz}{dt} = h(x, y, z),$$
 where f, g, h are continuous functions of x, y, z and satisfy the Lipschitz condition.

2. In the second part we consider the case when the functions f, g, h are linear in x, y, z and the system of equations (1) can be written in the form

(2)
$$\frac{dx}{dt} = Ax + By + Cz, \quad \frac{dy}{dt} = Dx + Ey + Fz, \quad \frac{dz}{dt} = Gx + Hy + Iz,$$
 where $A, B, C, D, E, F, G, H, I$ are constants.

45615

EMRAY E. WOLF,

Appellee,

v.

W. H. KAPPLE,

Appellant.

APPEAL FROM SUPERIOR

COURT, COOK COUNTY.

347 I.A. 312

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Judgment was entered on a verdict of \$12,000 for personal injuries sustained by plaintiff on March 26, 1948. Plaintiff was a subcontractor engaged in the installation of oil heating units in some of the houses which defendant, a building contractor, was constructing near Prospect Heights, Illinois. The case on plaintiff's behalf, which the jury believed and which is supported by ample evidence, is that he was called by defendant on the day he was to finish his work and told that defendant wanted to see him and that when he saw defendant's car on the premises, he should come over and talk to defendant; and that seeing defendant's car, plaintiff walked over to the house where the car was parked, opened the door to the utility room, took a step, and fell into an open trapdoor, seriously injuring his left leg. This trap door had been opened by defendant in order to enable him to enter a "crawl space" (shallow 3-foot basement) where he was inspecting the plumbing. Plaintiff called for help and one Clyde G. Rapp, defendant's supervisor, came from the kitchen, where he was working, and helped plaintiff out of the hole. After resting awhile in the kitchen, plaintiff managed, with the aid of an

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16. The sixteenth part of the report

17. The seventeenth part of the report

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19. The nineteenth part of the report

20. The twentieth part of the report

improvised cane, to get to his car and then to his doctor's office. The extent of plaintiff's injuries and treatment thereof will be discussed later. The house in question was not one on which plaintiff had worked. He had never been in it before and when asked whether he had looked to see whether there was a hole, he answered, "I did not look. I did not imagine a hole being in front there."

The principal error relied on by defendant for reversal is that plaintiff was a licensee and not an invitee. However, it would appear from undisputed testimony that the working relationship between plaintiff and defendant was close; that while the work was finished, there was still the question of settling the account for plaintiff's services; ^{and} that plaintiff came there for no social purpose nor for reasons of interest only to himself. Defendant was in general control of all the houses and he himself testified that the job was the "joint" business of defendant and his subcontractors who were "free to come and see me and discuss business at any time." Moreover, the testimony amply supports plaintiff's position that he was invited to the premises on business connected with the work. Plaintiff's own testimony to that effect was strongly corroborated by the witness Rapp who testified that defendant told him to let defendant know as soon as Wolf came or was on the property. Plaintiff, having come upon the premises controlled by defendant by express and implied invitation for a purpose reasonably connected with the

business carried on there by defendant, is an invitee.

Milauskis v. Terminal Railroad Ass'n, 286 Ill. 547; Purtel v. Philadelphia Coal Co., 256 Ill. 110; Pauckner v. Waken, 231 Ill. 276; Ellguth v. Blackstone Hotel, Inc., 408 Ill. 343.

Defendant argues that plaintiff was guilty of contributory negligence as a matter of law. In considering this question, we must accept the evidence most favorable to plaintiff, together with all reasonable inferences arising therefrom (Yess v. Yess, 255 Ill. 414; McCune v. Reynolds, 288 Ill. 188; Roadruck v. Schultz, 333 Ill. App. 476; Blair v. Blair, 341 Ill. App. 93, and many other cases there cited) and we cannot find that plaintiff was negligent as a matter of law unless we believe that all reasonable minds would so agree. Springfield Boiler Co. v. Parks, 222 Ill. 355; Moser v. East St. Louis & Interurban Water Co., 326 Ill. App. 542; Fugett v. Murray, 311 Ill. App. 323; Seybold v. Zimmerman, 294 Ill. App. 138. As this case now stands, twelve jurors and an able judge have found that plaintiff was not guilty of contributory negligence. We do not believe that all reasonable minds would concur in the opposite conclusion.

Error is assigned on the admission of testimony by Dr. Royal Fitch concerning the possibility of surgery on plaintiff's injured leg. Defendant contends that this testimony was highly speculative and caused the jury to return an excessive verdict. In order to understand the

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nature of this objection, it is necessary to summarize the testimony with respect to the diagnoses and treatment of plaintiff's injuries. After the accident, plaintiff had gone to the office of Dr. Wolferth. Dr. Wolferth found plaintiff's left knee bruised, swollen and tender and proceeded to give him diathermy treatments. On April 20, 1948 plaintiff also consulted an orthopedic surgeon, Dr. George L. Apfelbach, who diagnosed plaintiff's injuries as a torn internal collateral ligament of the left knee joint. He testified that plaintiff was unable to straighten out his leg because of muscle spasms caused by pain and inflammation and he advised a cast for six weeks to immobilize the ligament. Dr. Apfelbach did not see plaintiff again until March 12 or 13, 1951. At that time he found the interosseal muscle, the long muscle that goes in the knee, had atrophied. He straightened out plaintiff's leg and bent it and "could feel a clunk or hitch on the inside. When it clunks you know it is broken or loose." On trial, Dr. Apfelbach testified, without objection, to the following:

"* * * I made a diagnosis that he has an extra bone or calcium deposit underneath the ligament of the knee where it was torn; * * * and I say he had a broken internal semilunar cartilage * * * [These are] practically always of a traumatic origin. They are permanent at present and static, barring any surgery that might be attempted." (Italics ours.)

Dr. Fitch testified that plaintiff was sent to him by Dr. Apfelbach and visited him 37 times for diathermy treatments. He made no diagnosis, evidently relying on that made by Dr. Apfelbach. He testified that the only

other treatment that could be given plaintiff was surgery and that he could not answer what kind of surgery, since that would have to be determined by what the surgeons found. He was then asked whether he had an opinion "based upon reasonable medical and surgical certainty whether or not there is any risk involved in that kind of surgery." To this defendant objected on the ground that it was highly speculative. The witness answered over objection that there was a risk of ankylosis (stiffness) due to further injury to the joint. He further testified, over objection, that plaintiff's age, approximately fifty-five, would be a factor in this type of surgery.

While defendant argues that this testimony was for the purpose of augmenting damages, it appears to us that it was more in the nature of evidence to show that plaintiff was doing what he could to mitigate damages and that having exhausted all benefit which could be derived from the treatments he had been receiving, his only resort now was to surgery, which involved the risk of ankylosis. However, even if we accept defendant's argument that this testimony was intended to augment the damages, it is in our opinion not reversible error. Defendant did not cross-examine Dr. Fitch or Dr. Wolferth, and the cross-examination of Dr. Apfelbach was limited to eliminating as a possible element of damages the condition of varicose veins found in plaintiff's leg. Defendant presented no medical evidence on his behalf.

The amount of the verdict is not excessive. While plaintiff's medical expenses were not large, totaling \$263 paid to date of trial, his loss of earnings was substantial. Prior to the time of the accident his average earnings had been \$125 to \$135 per week. After the accident they declined to less than \$50 per week. He was forced to discontinue his long established oil installation business and, because of his age, it was not easy for him to obtain work in new fields not requiring the use of his legs. There is evidence to support plaintiff's argument that up to the time of trial his loss of earnings could be fairly computed at \$14,555 and that his leg was still stiff and painful. The verdict, in view of these circumstances, is by no means excessive and does not show the influence of Dr. Fitch's testimony with respect to surgery, especially in view of the fact that Dr. Apfelbach had given testimony, without objection, which clearly indicated that surgery was the alternative.

The cases cited by defendant in support of his position that the testimony of Dr. Fitch was reversible error are clearly distinguishable. The first case cited is that of Amann v. Chicago Traction Co., 243 Ill. 263, where the doctor testified that the injuries might tend to aggravate a pre-existing paralysis. The Supreme court held that the admission of this testimony was error, but that it was error which was harmless because the amount of the judgment, as reduced by a remittitur, was fair. In the

instant case, the verdict was supported by proof of loss of earnings and was fairly based upon that, without respect to the medical testimony in question.

In Lauth v. Chicago Union Traction Co., 244 Ill. 244 (1910), also cited by defendant, a verdict for \$20,000 was rendered. The only error relied on by defendant was that the damages were excessive. A doctor had testified that a hernia alleged to have been caused by the accident, had been strangulated and reduced several times. He was asked what would happen if strangulation were not reduced and replied that atrophy and death would result. It was pointed out that there was no difficulty in reducing such strangulation and that the possibility of death was extremely remote. Despite this, plaintiff's counsel had emphasized that possibility in their summation of the evidence to the jury. The court held that the prognostication of death could have had such strong influence on the jury as to induce a verdict too excessive to stand. No such powerful influence can be derived from the apparently mild testimony of Dr. Fitch in the instant case. These two cases are illustrative of the authorities cited by defendant on this point. The other cases are likewise distinguishable both on the facts and on the conclusions of the courts.

Defendant complains of the giving of the instruction defining the duty of defendant toward plaintiff as that of an invitee. The instruction tendered was as follows:

"The jury are instructed that one who invites another upon premises in his possession has a duty toward the person invited, to provide reasonable safe means of ingress and egress."

The objection is that it recites an abstract proposition of law and that the jury could well have interpreted it as an instruction by the court that plaintiff was so invited. The facts clearly support plaintiff's position that he was an invitee, and defendant did not put that point at issue on the trial nor did he offer an instruction defining the distinction between an invitee and a licensee. The instructions tendered by defendant revolved primarily around the issues of negligence and contributory negligence -- issues that would not have been relevant had plaintiff been a licensee. A defendant is not permitted to accept the issue as presented by plaintiff and allow the case to go to the jury on that issue and then after an unfavorable verdict raise the point for the first time. Ellguth v. Blackstone Hotel, Inc., 408 Ill. 343, 349-50. Defendant also complains of the instruction defining proximate cause. This instruction was in effect an amplified definition of the term as used in a preceding instruction, of which there is no complaint.

In our opinion, defendant received a fair trial and the verdict is amply sustained by the evidence.

Judgment affirmed.

Robson, J., concurs.

Tuohy, P. J., took no part.

45625

NORTHWEST APOSTOLIC CHURCH,
a corporation,

Appellant,

v.

RICHARD N. LINGENSJO and
MANUFACTURERS NATIONAL BANK
OF CHICAGO, a corporation,

Appellees.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

34714313

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE
COURT.

It appears from the additional abstract of record in this cause that the complaint filed herein sought an accounting from defendants with respect to the proceeds derived from the sale of church property. The decree entered in this cause finds against plaintiff in this respect and holds that an accurate and complete accounting had been made by defendant Lingensjo and further finds that the costs, taxed at \$512.95, should be divided equally between plaintiff and defendants. Plaintiff does not appeal from any portion of the decree. Dispute arises with respect to deposits made by the parties with the master and subsequently deposited by the master with the clerk of the court in the sum of \$500 each as security for the payment of master's fees. Plaintiff says that this was an involuntary payment exacted by the master; was in violation of Section 3 of Rule 58 of the Superior Court and of the statutes and constitution, and that the court committed error in refusing to order the master to return this sum to plaintiff. It would appear in the light of the provisions of the decree that this issue is practically moot



because if the master were ordered to return the full amount of the funds deposited by plaintiff, plaintiff would then certainly be bound to pay that portion of the master's fees chargeable to it pursuant to the decree of the court. In a hearing on the issues as to whether or not the master in chancery compelled plaintiff to make this deposit, an attorney for defendants testified that after all the proofs were in and the matter submitted on written statements, he suggested to the master that as plaintiff was no longer in existence as a corporation, an order should be entered in the case requiring both sides to put up security for costs; and that the attorney for plaintiff concurred in this, stating as a further reason that defendant Lingsenjo was a nonresident of the state. The master gave the same version of the understanding and stated that he gave the attorney for plaintiff a receipt which recited that the deposit was voluntarily made without any demand on his part. This receipt was approved and accepted by attorney for plaintiff. The attorney for plaintiff gave a somewhat different version, but the chancellor heard the witnesses, and we must accept his conclusions thereon.

No objection was made in court or otherwise to this procedure until after the master had made his findings. The case is substantially the same as that of Schroeder v. Brennan, 345 Ill. App. 87, where the third division of this court held that plaintiff waived his right to complain by waiting until after the master's report was filed before making any objection.

Order affirmed.

Robson, J., concurs.
Tuohy, P.J., took no part.

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45642

JACK N. MUECK,	Appellant,)	APPEAL FROM MUNICIPAL
)	COURT OF CHICAGO.
v.)	
PAUL ASCALA,	Appellee.)	

347 L.A. 213²

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Plaintiff obtained a judgment by default, no appearance being entered for defendant, on July 12, 1950 for conversion of a violin delivered to defendant for safekeeping. Execution was issued March 27, 1951 and returned "No part satisfied" June 26, 1951. On May 17, 1951 a petition was filed to vacate the judgment. The petition alleged that defendant had retained a lawyer who did not appear for him; that defendant was ignorant of legal procedure and that he had in his possession a receipt from plaintiff reciting that plaintiff had received all the property which he had entrusted to defendant; that defendant had turned this receipt over to his lawyer and that he did not hear anything more about the case until an execution was served on him on May 9, 1951. The matter came up May 17, 1951 and the court overruled the motion. On May 25, 1951 defendant made a motion to correct errors of fact pursuant to par. 21 of the Municipal Court Act (ch. 37, sec. 376, Ill. Rev. Stats. 1951). This was supported by an affidavit substantially the same as that supporting the motion to vacate. It is in fact somewhat less direct in its recitals. It states that plaintiff and/or his attorney were cognizant

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of the existing receipt which recited that plaintiff had received all the property which he had entrusted to defendant. It is to be noted that nowhere does defendant say that he had in fact returned the specific property to plaintiff. The court sustained the motion of defendant and vacated the judgment. It is from this order that plaintiff appeals. No brief has been filed by defendant in this court. ✓

The motion and affidavit sustaining it do not present any "error of fact" which would affect the validity and regularity of the judgment. Hurley v. Zimbon, 336 Ill. App. 355; Seither & Cherry Company v. Board of Education, 283 Ill. App. 392; Chapman v. North American Life Insurance Co., 212 Ill. App. 389, aff'd 292 Ill. 179; Gustafson v. Lundquist, 334 Ill. App. 287.

The fact that defendant had entrusted his case to a lawyer and failed to appear is not such an error of fact as may be corrected by a motion under sec. 21 of the Municipal Court Act as amended. Trust Company of Chicago v. Public Service Company of Northern Illinois, 324 Ill. App. 228; Seither & Cherry Company v. Board of Education, 283 Ill. App. 392.

Order reversed and cause remanded with directions to vacate the order setting aside judgment and to permit the original judgment in favor of plaintiff to stand.

Robson, J., concurs.

Tuehy, P.J., took no part.

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45685

BENJAMIN CHEMERS COMPANY, a corporation,
LESLIE ELSON COMPANY,
Successor Plaintiff,
Appellee,

v.

ARTHUR T. GALT,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

347 I.A. 314

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendant Arthur T. Galt was the owner of improved property located at 712 North Clark street, Chicago. The front of the building was occupied by a grocery store; at the rear of the property was a one-story brick garage generally used for grocery storage and for garaging an automobile. Immediately to the south was the 710 North Clark street property, to which plaintiff was adding a brick addition in the rear. Plaintiff notified defendant to take proper steps for shoring up his adjoining property, during the period of construction, so as to avert possible damage. Inasmuch as plaintiff was engaged in the general contracting business, defendant authorized it to take the necessary steps to protect defendant's building, at a cost not to exceed \$1000.00. Plaintiff performed the services, furnished the materials necessary for shoring up defendant's property, and rendered an itemized statement for its services in the amount of \$732.67. Upon defendant's failure to pay the bill, plaintiff brought suit in the Municipal Court where, pursuant to hearing, the trial judge found the issues in favor of plaintiff, and entered judgment in the amount demanded, together

with interest and costs.

As the sole ground for reversal it is urged that plaintiff cannot recover for its services because it failed to first obtain a permit from the commissioner of buildings to do the temporary shoring. Defendant devotes the major portion of his briefs to the proposition that all existing laws, whether embraced in the contract between the parties or not, are just as much a part of the contract as though set out in the context of the agreement, and cites numerous cases in support of his contention. Although defendant does not refer to any particular ordinance requiring a party to obtain a permit to do temporary shoring, he presumably relies on section 43-1 of the municipal building code as indicating the necessity for such a permit. This ordinance provides: "It shall be unlawful to proceed with the erection, enlargement, alteration, repair, removal, or demolition of any building, structure, or structural part thereof within the city unless a permit therefor shall have first been obtained from the commissioner of buildings."

On trial of the cause the parties stipulated that plaintiff rendered the services and furnished the materials necessary for shoring up defendant's property, that the amount of \$732.67 was reasonable and within the terms of the contract, and that plaintiff did not obtain a permit; and upon the basis of that stipulation the question submitted to the trial judge was whether or not plaintiff was required to take out a permit within the provisions of section 43-1. The



quoted ordinance does not include the term "shoring," and from the context of the ordinance it cannot be inferred that the operation of shoring was meant to be included. If the city council had intended to require issuance of a permit before shoring could be performed, it would have specifically included that operation in the section quoted above, or elsewhere in the building code. The word "shoring" is in common usage in building terminology, and shoring is a common practice; to compensate for the loss of lateral support incurred during a period of excavation, temporary shoring is usually required for adjacent buildings.

Accordingly, we think the trial judge properly held that plaintiff was not required to obtain a permit to perform the temporary shoring service which merely protected defendant's building during the period that plaintiff's excavating operation was in progress and until the earth was replaced and the new building erected; after the completion of that project the need for such shoring no longer existed. Defendant requested plaintiff to perform this service, received the benefit thereof, and should be required to pay for it.

We find no convincing reason for reversal, and therefore the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

Burke, P. J., and Niemeyer, J., Concur.

252 A

45709

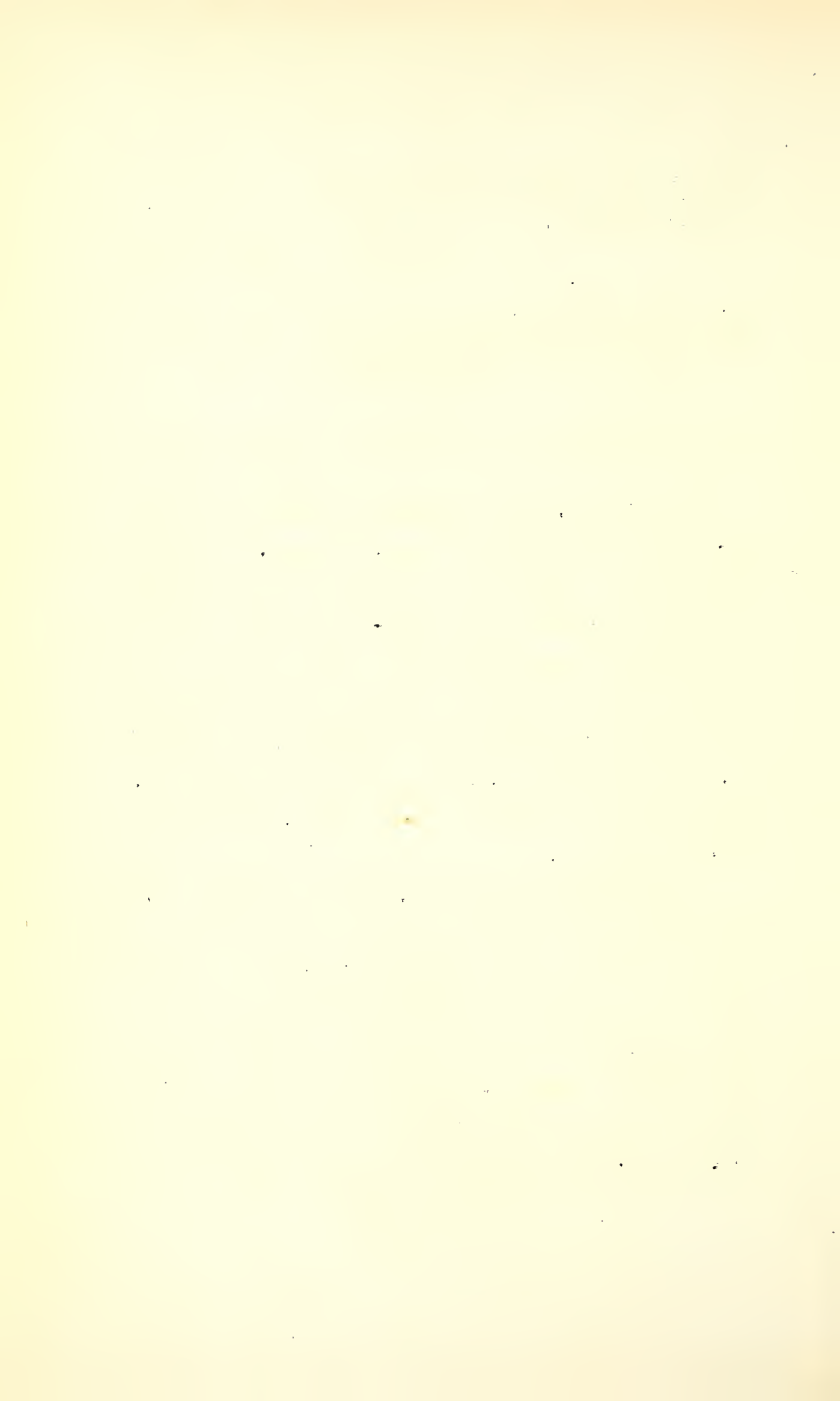
IMOGENE CRUTCHFIELD, Administratrix of the Estate of JERRY WAYNE CRUTCHFIELD, a minor, deceased,	)	APPEAL FROM
Appellant,)	
v.	)	CIRCUIT COURT,
WILLIAM MEYER and EDWARD MEYER, copart- ners, trading under the name and style of WILLIAM MEYER COAL AND ICE COMPANY,	)	COOK COUNTY
Appellees.)	

348 I.A. 315

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff, as administratrix, brought suit under the Injuries Act (Ill. Rev. Stat. 1951, ch. 70) to recover damages for the death of her five-year old son, alleged to have been caused by negligence on the part of defendants in the management and operation of their automobile truck. Trial by jury resulted in a verdict of not guilty. Plaintiff's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial was overruled. Judgment was then entered on the verdict, from which plaintiff appeals.

Jerry Wayne Crutchfield, about five years old, who lived with his parents at 2148 Congress street in Chicago, was struck and killed by defendants' truck in the alley running north and south within the block bounded on the north by Van Buren street, on the west by Leavitt street, on the south by Congress street and on the east by Hoyne avenue. The elevated structure crosses this block from east to west about midway between Van Buren and Congress streets.



South of this structure is an open area-way permitting vehicular traffic from Hoyne avenue to the alley. The accident occurred on November 19, 1947, at about ten o'clock in the forenoon.

The testimony of plaintiff's and defendants' witnesses is irreconcilable. The vehicle, a 1941 Ford truck, was owned by William and Edward Meyer, copartners, trading under the name and style of William Meyer Coal and Ice Company, and was used to haul coal and ice. On the day of the accident it was being driven by Edward Meyer, then approximately seventeen years old. Martin Buikema, Jr., was a helper on the truck. He testified by deposition that they entered the main alley, where the accident occurred, from Hoyne avenue, drove west a short distance into the alley, then turned left or south, and proceeded toward Congress street; that there were no children playing in the vicinity of the alley as they entered it; that a laundry truck was parked in the south end of the alley, blocking their entrance into Congress street; that they drove up to it, stopped and waited about five minutes, and then decided to back up and go out the way they had come in. Buikema, who had been sitting to the right of Meyer, stepped on the running board and looked back from his side of the truck, and Meyer also looked back from the driver's side through a window. Buikema's deposition further stated that it seemed as if the truck had run over something and, looking up, he saw the child lying about

twenty-five feet in front of the truck; that the two boys then ran out and, being unable to find anyone around, picked him up and took him to the County Hospital. Objection was made to the competency of Edward Meyer under the provisions of the Evidence Act (Ill. Rev. Stat. 1951, ch. 51, sec. 2), and he was not permitted to testify.

Two witnesses, Ann Dudzienski and Angela Papa, testified on behalf of plaintiff. Mrs. Dudzienski lived at 2155 West Van Buren street, occupying a second-floor apartment, which was to the west of the north-and-south alley and near the northwest corner of the block. There were two apartments to the east and between her apartment and the alley. Her building, which was north of the elevated structure intersecting the alley between Congress and Van Buren streets, had a porch on the rear facing south. She stated that while eating breakfast she saw defendants' truck enter the alley from Van Buren street; that there were four or five children playing in the alley; that the truck was traveling between fifteen and twenty miles an hour; that the children scattered and that, although she did not see the impact, when she looked around she saw the deceased child lying on the ground about twenty-five feet back of the truck. On cross-examination she admitted that the accident happened south of the elevated structure. Mrs. Dudzienski then called Mrs. Papa (plaintiff's other witness), who did not see the accident, but went out to the alley and saw the child lying, as she stated, about twenty-five feet back of the truck.



The respective versions of the accident given by Martin Buikema, the helper on defendants' truck, and the two witnesses for plaintiff, cannot be reconciled. Mrs. Dudzienski had the truck entering the alley from Van Buren street. She testified that children were playing in the alley and that after the accident the deceased child was lying back of the truck. Mrs. Papa purported to verify this version of the accident by also stating that the child was lying behind the truck. Buikema, on the other hand, testified that the truck entered the alley from Hoyne street and turned south toward Congress, where the parked laundry truck obstructed passage to Congress street, and that the child was struck in the process of backing up the truck and was first noticed by him lying twenty-five feet in front of the truck toward the Congress street entrance. In the circumstances it was within the province of the jury to determine whether Buikema's version of the accident or that of plaintiff's witnesses was true. Juries are required to find the facts, and where, as here, the testimony is irreconcilable, the court will not substitute its judgment for that of the jurors, and it may well be that the trial court reached the same conclusion as did the jurors; if the jury chose to believe Buikema's testimony, they were justified in also finding that defendants were not guilty of negligence which was the proximate cause of the injuries resulting in the death of the child, since they had no means of knowing nor any reason to suspect that he was behind the truck when Meyer began to back it up. Plaintiff, evidently realizing that the jury might have some

difficulty in believing the testimony of her witnesses, at the close of the evidence filed an amended complaint setting up charges of negligence on the part of defendants in backing up the truck as they did, but no evidence was introduced to support this theory.

As one of the grounds for reversal it is urged that the argument of defendants' counsel to the jury was prejudicial; specifically plaintiff argues that defendants' counsel stated to the jury that a verdict against defendants would be a stigma placed against them for life. This charge must be read in its context; defendants' counsel said: "This lawsuit is equally^{as}/important to the defendants as it is to the plaintiff. It is a serious matter to them, not only from a pecuniary standpoint, but from the standpoint of Mr. Zazove's closing words, that these defendants killed this child in cold blood. A verdict against the defendants on your part would not only be a money damage verdict against them, but also be a stigma of that type placed against them for life." This comment was made in response to the emotional appeal made by plaintiff's counsel: "What is there in this case? No defense. They killed that kid in cold blood and didn't give him a dog's chance." There are many cases in this state holding that a party can have no just ground for complaint on account of remarks improper in themselves which are necessitated, or at least provoked, by like remarks on the other side. Field v. Ingersoll, 228 Ill. App. 457; Walsh v. Chicago Rys. Co., 303 Ill. 339; Chapin v. Foege,

296 Ill. App. 96.

Lastly, it is urged that the court erred in instructing the jury. We have examined the instructions criticized by plaintiff. They substantially stated the rules of law applicable to the case and were not prejudicial.

We find no convincing reason for reversal; therefore, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

Burke, P. J., and Niemeyer, J., Concur.

253A

45439

WALLACE NELSON,

Appellant,

v.

HARRY J, McMAHON, Administrator
of the Estate of John McMahon,
Deceased,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

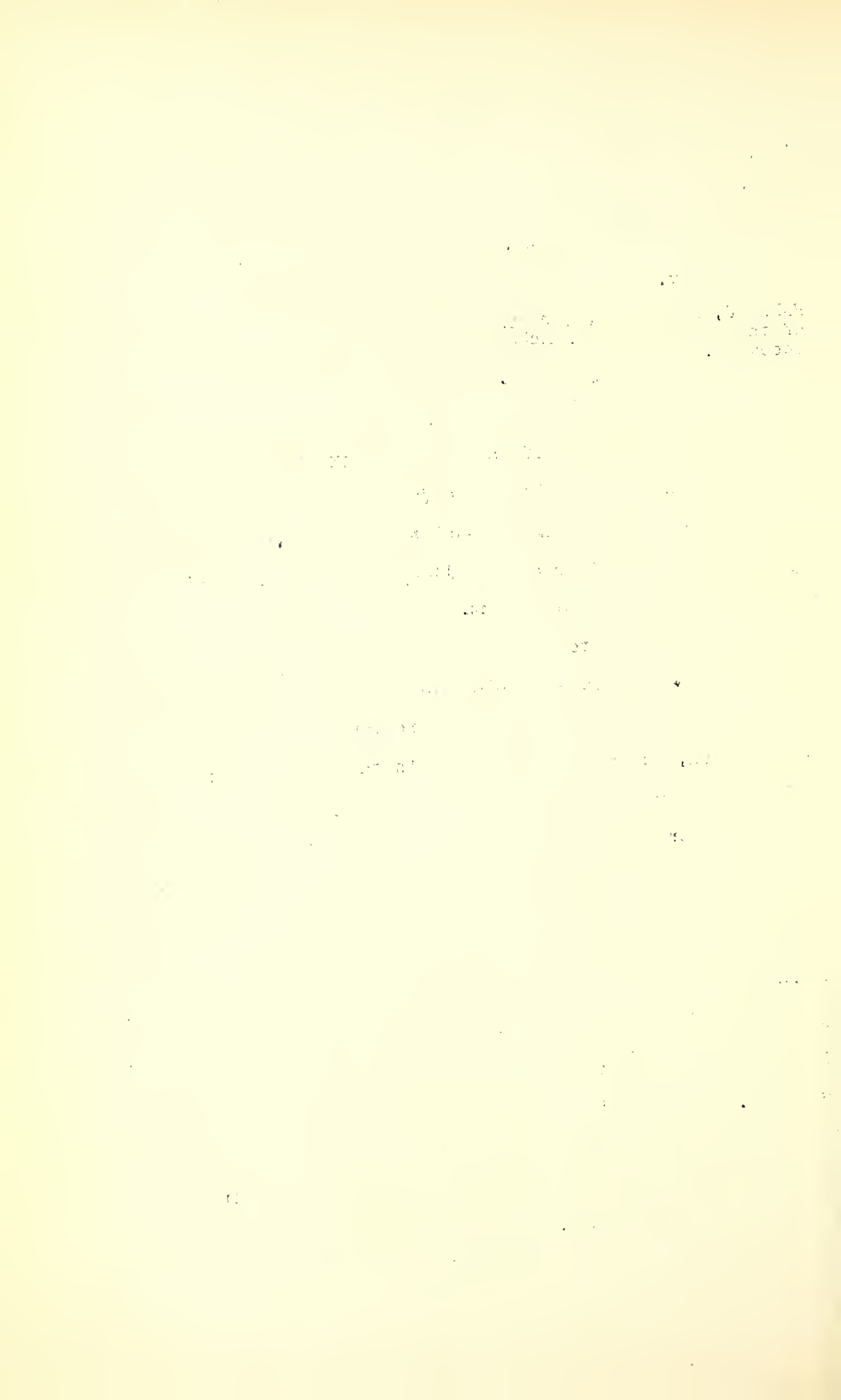
347 I.A. 315²

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment for defendant in his action for personal injuries sustained in a collision between two automobiles at the junction of Vincennes avenue and 121st place in Blue Island.

In addition to the general verdict of not guilty, the jury answered "No" to a special interrogatory submitted to it at the request of defendant, as follows: "Was the deceased, John McMahon, guilty of negligence in the operation of the automobile he was driving at the time and place of the accident in question?"

Vincennes avenue, referred to in the evidence as a north and south street, is a four lane through highway. 121st place, an east and west street, extends west from Vincennes avenue. There is a stop sign at the southwest corner. On the northwest corner is a tavern with a large neon sign which was lighted at the time of the accident, about midnight of January 25, 1947. Defendant's intestate John McMahon was driving his father's Hudson car east on 121st place. Plaintiff was a guest in a Plymouth driven by John White in the southbound lane of Vincennes avenue. There are only two occurrence witnesses, plaintiff and John White. Plaintiff testifies that



he did not know how the accident occurred. He repeats several times that the last thing he remembers is when the Plymouth car crossed the Rock Island tracks at about 119th and Vincennes, two or three blocks from where the accident occurred. John White, the driver, testified that he entered Vincennes avenue north of 103rd street; that it is about 40 feet wide at 121st place; that there are two lanes for southbound traffic and two for northbound; that he knew there were stop signs all along there on the intersecting streets as they came into Vincennes; that he could not tell what speed he was driving before the accident but it was a moderate speed; he did not see the other automobile before the impact and did not see headlights at any time; he did not know the exact point of the impact or notice the respective positions of the two cars after the impact and didn't know what part of his car was damaged. He testified further: "The pavement was a little damp. The corner is bad as far as visibility goes; it is a bad intersection. There were cars parked around the tavern on Vincennes and 121st place. I noticed them as I was coming up to the intersection. I did not slow down at all for 121st place. The cars parked there would interfere with my vision as to traffic coming east on 121st place but wouldn't make it blind. I don't know whether I hit the other car or whether the other car hit me. I don't know where I hit the other car. I don't know what direction the other car was going." Evidence of witnesses who arrived on the scene after the collision shows that there was some debris, broken glass, somewhere in the southbound lanes of Vincennes avenue, pretty near right straight out from the intersection;

that the Plymouth car was on the east side of Vincennes and the Hudson car on the west side, facing south; that both cars were south of the intersection. The right front of the Plymouth was damaged and the left front of the Hudson was smashed in. Walter Sweeney, cousin of the deceased driver of the Hudson, was riding with him. At the time of the trial he was a student at Notre Dame University and was not called as a witness.

At the close of plaintiff's evidence and at the close of all the evidence defendant moved for a directed verdict. These motions were denied. Plaintiff contends on appeal that the verdict of the jury and the answer to the special interrogatory are against the manifest weight of the evidence. This contention cannot be sustained. As heretofore shown, there is no direct testimony as to how the collision occurred. Plaintiff testifies that he remembers nothing after crossing the railroad tracks two or three blocks from the scene of the accident. White, the driver of the car in which plaintiff was riding, testified that he did not know whether he hit defendant's car or was hit by it; that he did not see the Hudson car before the impact and did not know the exact point of the collision. Plaintiff argues that the location of the debris in the southbound lane of Vincennes avenue warrants the inference that the deceased driver of the Hudson car turned into the avenue north of the center line of 121st place and that this was prima facie evidence of negligence. Defendant attacks this conclusion and insists further that the fact the two cars came to a stop after the accident south of the junction

of the two streets is evidence that White was driving at an excessive rate of speed. As to how the accident happened is purely a matter of speculation. Moreover, the burden rested upon plaintiff to show affirmatively that he was in the exercise of due care and caution for his own safety at the time of the accident. Dee v. City of Peru, 343 Ill. 36. The mere fact that he was a guest passenger in White's car did not excuse him from exercising this care. Lasko v. Meier, 394 Ill. 71. There is no evidence tending to show the exercise of care for his own safety or of any fact or circumstances excusing such care.

Where, as here, plaintiff^{has} failed to make a prima facie case, errors if any in giving and refusing instructions will not warrant setting aside a verdict of not guilty and granting a new trial. Trainor v. McCann, 344 Ill. App. 262. We have, however, examined the instructions and plaintiff's argument against them. The court gave four instructions directing the finding of a verdict of not guilty. Instruction 19 was a stock instruction requiring the plaintiff to prove his case by a preponderance of the evidence. Instruction 21 directed a verdict for defendant if plaintiff was guilty of want of ordinary care which caused or proximately contributed to cause his injury. Instruction 25 required plaintiff to prove each of three propositions essential to recovery. Instruction 26 required plaintiff to show ordinary care for his own safety notwithstanding he was a guest passenger in the automobile of White. Each instruction referred to a different aspect of the case and the giving of them was not erroneous merely

because they ended with a direction to find the defendant not guilty. Complaint on other grounds is made against instructions 19, 21 and 26. As heretofore stated, instruction 19 is a stock instruction, frequently given, and although argumentative it is not erroneous and the giving of it is not error. Instruction 21 properly stated the rule that where plaintiff and defendant are each guilty of negligence proximately contributing to the injury complained of, the jury is not warranted in comparing the degree of negligence of the parties. Mowat v. Sandel, 262 Ill. App. 395. Instruction 26 properly stated the rule announced in Lasko v. Meier, supra, that a plaintiff is not excused from showing the exercise of reasonable care for his own safety merely because he is ^a guest passenger in an automobile. No error was committed in giving instructions on behalf of defendant.

No presumption arises against defendant for failure to call Sweeney as a witness. Although he was the cousin of the deceased driver of the Hudson and the nephew of the defendant administrator, his testimony was as available by deposition or subpoena to plaintiff as to defendant. No presumption of control of the witness arises from the relationship to defendant or his intestate.

The judgment is affirmed.

AFFIRMED.

Burke, P. J., and Friend, J., Concur.

254 A

45781

CLARE FREEHILL,

Appellee,

v.

BENJAMIN J. GORNY and S. CHARLES
BUBACZ,

Defendants.

On Appeal of BENJAMIN J. GORNY,
Appellant.

INTERLOCUTORY APPEAL

FROM CIRCUIT COURT

COOK COUNTY

347 I.A. 316¹

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant Gorny appeals from an order granting a temporary injunction restraining the enforcement and collection of a judgment of the County court obtained by him against the plaintiff herein on a promissory note executed by plaintiff on May 28, 1950, payable to Gorny for the sum of \$1,000, with interest at 3 per cent until paid.

Plaintiff alleged in her complaint that the execution of the promissory note and the power of attorney to confess judgment attached thereto were obtained through the fraud of one Bubacz, and that he, not Gorny, was the true and lawful owner of the note. She further alleges inadequacy of remedy at law and prays for a permanent injunction against Gorny restraining the enforcement or collection of the note. The temporary injunction was entered on plaintiff's petition supported by affidavit alleging fraud in procuring the note. The petition does not allege fraud in the procurement of the judgment. There is no allegation that plaintiff took any steps in the County court to have the judgment set aside.

The case is governed by Kahn v. Rasof, 253 Ill. App. 546, in which on facts substantially similar to those presented here the court held that equity will not enjoin the collection of a judgment by confession on the ground that the judgment notes were procured by fraud, where no motion has been made to vacate the judgment. Plaintiff has an adequate remedy at law.

The bond filed in support of the injunction is substantially defective. It fails to comply with the statute (Ill. Rev. Stats. 1951, chap. 69, sec. 8) in that it is not conditioned on the payment "of all moneys and costs due to the owner of the judgment." The omission of this condition was probably an oversight.

The order is reversed.

ORDER REVERSED.

Burke, P. J., and Friend, J., Concur.

255A

45785

WILLIAM W. HEISE,
Appellant,

v.

CHICAGO BOARD OF UNDERWRITERS,
a corporation,
Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

3431A. 316²

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment for defendant entered on a directed verdict in his action for damages arising from alleged wrongful interference with and destruction of plaintiff's insurance agency.

Suit was instituted May 22, 1944. The case was tried on a second amended complaint which charged that the plaintiff, for many years an insurance agent and broker selling insurance in Chicago and Illinois, was a member of the defendant board of underwriters from 1927 until October 1934, when the defendant wilfully, arbitrarily, illegally and without any complaint or lawful proceedings or charges made or filed against the plaintiff, canceled, forfeited and held null and void the plaintiff's stock or membership in defendant, thereby ending his right to conduct his business of insurance agent and broker by, through or with the defendant or any or all of the defendant corporation's members and depriving him of his right of livelihood from said insurance business. With the exception of testimony of a certified public accountant relating solely to the question of damages, plaintiff's claim rests upon his own testimony.

The evidence shows that the defendant is a corporation not for profit, organized "to promote the best interests of all insurance companies and their representatives who are members of the corporation and transacting the business of marine, fire and life insurance in the State of Illinois under the authority thereof." The by-laws provide that members shall give preference to companies represented by members, and that after making reasonable efforts to procure the insurance required upon regular terms in such companies a member may then place the insurance, under the form and rate prescribed by law, with nonmembers or with insurers which are not represented by members. Plaintiff testified that on October 23, 1934 he appeared at the office of the Superintendent of Insurance of the State of Illinois at Springfield in response to a telephone call; that without previous notice or any specification of charges against him he was directed to be sworn and take the witness stand for examination; he refused, left the office of the superintendent, consulted an attorney, and on returning to the office of the superintendent on the same day was advised that his licenses had been revoked. Certiorari proceedings were instituted immediately and on October 24, 1934 the writ was granted and the record canceling plaintiff's licenses quashed. This action of the trial court was affirmed in Chicagoland Agencies, Inc., Appellee, v. Palmer, Appellant, 364 Ill. 13. Plaintiff returned to his Chicago offices on the 24th, where he found two letters from the Superintendent of Insurance notifying him of the cancellation of his licenses, and a slip or printed notice

from the defendant stating that, his license having been revoked by the Superintendent of Insurance, plaintiff had been dropped as a member of defendant; that he went to the offices of defendant where he saw the manager and the secretary, protested against the action taken by defendant and informed them of the judgment obtained in the certiorari proceedings at Springfield; that nothing was done by defendant to retract the notice or withhold plaintiff's expulsion, and as a consequence he lost the agency of the twelve companies which he then represented and was unable to continue in business as an insurance agent and **broker**. A verdict for defendant was returned by direction of the court and judgment entered on the verdict. ✓

Defendant's answer denied the cancellation of plaintiff's membership or his expulsion as a member in October 1934, but states that plaintiff was expelled in 1935 because he no longer had the agency of three insurance companies. Defendant also interposed the defense of the statute of limitations (sec. 16, chap. 83, Ill. Rev. Stats.) limiting the right to bring an action to five years. In its brief it cites authorities to sustain its position that plaintiff's action is actually one in tort, governed by the five year statute, or is an action on an implied contract, subject to the same limitation. In his reply brief plaintiff confines himself to a single paragraph answering each contention without citing any authorities. We believe the case is governed by the rule announced in Brennan v. United Hatters of North America, 73 N. J. L. 729. ||

This was an action brought by a member of a labor union who alleged that he had been wrongfully expelled from the union without notice or hearing, as provided by the rules and regulations, and as a consequence discharged from his employment and rendered unable to obtain other employment because members of the union refused to work with nonunion men. The action was declared to be an action in tort and subject to the statute of limitations governing such actions. So in the present case, the basis of plaintiff's claim is the unlawful interference with and destruction of his business by cutting off his right to do business and deal with members of defendant. His certificate of membership is merely evidence in the case. The action being one in tort, it is barred by the statute of limitations and the court properly directed a verdict for defendant. This conclusion makes it unnecessary to consider other points raised.

The judgment is affirmed.

AFFIRMED.

Burke, P. J., and Friend, J., Concur.

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STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

May Term, A.D. 1952

347 I.A. 435

General No. 9800

Agenda No. 2

INA HUDSON,)	
Plaintiff-Appellee,)	
vs.	)	Appeal from
	)	Circuit Court of
HARRY L. HUDSON,	)	Greene County
Defendant-Appellant.)	

O'Connor, P.J.

Ina Hudson filed a suit for divorce against her husband, Harry L. Hudson, in the Circuit Court of Greene County. The complaint was based upon desertion. In the answer of the defendant there was included an affirmative defense stating that because of the condition of his health it was necessary that he spend considerable time in Arizona during the period from May, 1946 to April 3, 1949. The affirmative defense also alleged that upon his return to Petersburg, Illinois on April 3, 1949, he was informed by the plaintiff that there was no room for him in their marital home and that she refused to remain in the same building with him. The facts are that at that time the plaintiff owned and operated a hotel in Petersburg and maintained an apartment in the hotel building.

The plaintiff admits the allegations relative to the health of her husband, but denies that he was prevented admission to the apartment in the hotel, or that she ever made such assertions relative to his not being welcome upon his return from Arizona.

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By counter-claim the defendant prays for a divorce from his wife on grounds of adultery. Issue was joined on the pleadings and the cause was tried by the court without a jury. ✓

After considerable testimony and the introduction of correspondence between the parties the court decided the case in favor of the complainant on her complaint and against the defendant on his counter-claim. The decree declared defendant guilty of desertion as of April 4, 1949 and granted her a divorce. The defendant was barred of any rights of dower and he was relieved of any obligations "of payment of any and all notes executed by him jointly with Ina L. Hudson securing a real estate mortgage on the hotel property in Petersburg." A motion to vacate the decree was heard and denied and this appeal followed.

At the outset it can be firmly stated that defendant has wholly failed to prove the allegation of adultery on the part of his wife as is alleged in his counter-claim. The contrary is not argued in the briefs of the appellant. It is the contention of the appellant that the events on and leading up to the 3rd and 4th days of April, 1949, did not amount to desertion on the part of this defendant-appellant, and at the extreme amounted only to a separation by agreement between these parties.

If the contention of the appellant is correct no divorce should be granted here; for in Maxwell v. Maxwell, 333 Ill. App. 625, at page 629, the Illinois law was followed in that the living separate and apart by married persons with their mutual consent, is not such a separation as the law contemplates to entitle either to a divorce.

The parties were married August 9, 1946, and the plaintiff engaged in the hotel business in Winchester, Illinois, and

THE UNITED STATES OF AMERICA

IN SENATE
JANUARY 1, 1902

REPORT
OF THE
COMMISSIONER OF THE
GENERAL LAND OFFICE
IN RESPONSE TO A RESOLUTION
PASSED BY THE SENATE
JANUARY 1, 1902

ALBANY:
J. B. LIPPINCOTT & CO.,
PRINTERS.
1902

THE
COMMISSIONER OF THE
GENERAL LAND OFFICE
ALBANY, N. Y.,
JANUARY 1, 1902

THIS REPORT WAS
PRESENTED TO THE SENATE
JANUARY 1, 1902

later in Petersburg. The defendant worked part of the time in the hotel for her and spent considerable time in Arizona to benefit his health. On one occasion both of them were together in Arizona for a few months. Prior to the return of the defendant-appellant to Illinois in April, 1949, the correspondence between these people introduced into evidence, clearly shows that they had contemplated a divorce. They were living apart by mutual agreement. This was because of the requirements of his health that he be in Arizona a great portion of the time, particularly in the winter, and his willingness that she not stay there with him so long as she did not like to live in the west. ✓

Following a series of letters in which the plaintiff requested his co-operation in securing a divorce, which letters also contained many friendly and casual comments relative to the business, and other items of mutual interest, this defendant returned to Petersburg unannounced on April 3, 1949. His wife was not at the hotel when he arrived, but their apartment was not locked. He did not enter their apartment but secured a room on another floor from the room clerk. Shortly after his arrival the plaintiff returned and they had a conversation. They talked further the next morning after having spent the night apart. The plaintiff testified that her apartment door was not locked at any time that night and that at no time did her husband come or attempt to come to the apartment. This testimony was not disputed by the defendant.

The defendant's version of the conversation contains a directive by his wife that he could not stay there and there was no room for him, and that she would not stay in the same

building with him. This is denied by the plaintiff who claims that he showed her no affection and that their conversation was mainly about his health and other general topics. The next morning, after having had coffee with her and having had a further conversation, he obtained a ride from a driver of a bakery truck to Jacksonville, and he later established his residence in Roodhouse, Illinois. The plaintiff told of having called upon him with her mother in May, 1950, at Roodhouse. He refused to live with her and would not go for a ride to talk their marital situation over. She was corroborated in this by the testimony of her mother who quoted the defendant as saying, "I have taken my last ride with her."

The trial judge patiently heard considerable testimony and while so doing had the opportunity to see and observe the witnesses as they gave the conflicting testimony relative to the conversations had between these parties at the hotel on the 3rd and 4th days of April, 1949, immediately upon his return from Arizona and just before he took the bread truck to Jacksonville. Such opportunity could have been very helpful to the trial judge in reaching a conclusion as to just what was said by the parties on those occasions. While it is clear that his living in Arizona and her living in Illinois was mutually agreeable, and that while they were so doing there was clearly no desertion on the part of either person, it can be conceived that a trial judge hearing this evidence would not conclude that the separation of April 4th was by the same consent. It could be that the defendant made the decision not to live with her further and to leave the hotel as he did on the belief that she had committed adultery. However, if

he is to rely on that as his excuse in law for his conduct, he must prove it by proper evidence. He failed so to do. ✓

The crux of this case is what occurred on the return of the defendant to Illinois. We do not feel that the conclusion reached by the trial judge is inconsistent with the evidence, and see no error in his finding the defendant guilty of desertion and persisting in such desertion based upon his refusal to re-establish the home or to discuss the matter at his home in Roodhouse when this plaintiff called upon him with her mother. ✓

We agree that if the appellant has signed notes as surety, co-maker or otherwise with this plaintiff in connection with the real estate upon which the hotel is located, that the decree in this case cannot terminate any rights which the holders of those notes might have had against the defendant-appellant, and this is particularly true when such persons are not parties to this action. The decree dated December 15, 1950 of the Circuit Court of Greene County is therefore modified by striking therefrom paragraph four as follows:

"It is further ordered by the Court that the defendant Harry L. Hudson be, and he is hereby, released from all obligations of payment of any and all notes executed by him jointly with Ina L. Hudson securing a real estate mortgage on the hotel property in Petersburg."

We do not consider it error for the court to have held the separation as of April 4, 1949 to have amounted to desertion on the part of this defendant, the same desertion having continued for an uninterrupted period of one year thereafter prior to the filing of the suit.

The decree as modified is affirmed.

Affirmed as modified.

he is to help me out in all matters in the top office, etc.

and only if he is a good man. He is to be a good man.

And now he has to be a good man in all matters.

It is the duty of a good man to be a good man in all matters.

And now he has to be a good man in all matters.

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Abstract

2047

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STATE OF ILLINOIS

APPELLATE COURT

THIRD DISTRICT

MAY TERM, A.D. 1952

347 I.A. 436¹

General No. 9820

Agenda No. 3

P. L. Jones,

Plaintiff-Appellant,

vs.

Earl S. Hodges,

Defendant-Appellee.

Appeal from

Circuit Court of

Macoupin County

Wheat, J.

This is an action for a declaratory judgment brought by P. L. Jones, Plaintiff-appellant, against Earl S. Hodges, Defendant-appellee, for the purpose of declaring and determining that a certain agreement between the parties as to attorney fees to be paid by plaintiff to defendant be declared null and void. The trial court found the issues in favor of the defendant from which judgment this appeal is taken. ✓

In November, 1942, plaintiff engaged defendant as an attorney to file a suit or suits for the purpose of setting aside and having declared null and void certain deeds purportedly executed by plaintiff's wife, Dora Zelmer Jones in her lifetime but then deceased, in which she purported to convey certain property located in Carlinville, Illinois, and Morton County, North Dakota. It appears that an oral agreement was then made by which defendant Hodges would receive as his fees 50% of any amount recovered after

first deducting the costs of the litigation. On November 17, 1942, the defendant caused to be filed a complaint and suit in equity on behalf of the plaintiff in the Circuit Court of Macoupin County, Illinois, relative to the above. Subsequently while this suit was pending defendant Hodges prepared a letter dated June 8, 1945, confirming the oral agreement as to fees which was in writing, accepted by the plaintiff. On September 30, 1947, plaintiff notified defendant by letter that he was terminating the contract because of alleged lack of diligence on the part of defendant in prosecuting said suit in which letter he requested the defendant to turn over all papers and documents in connection with the case to other attorneys. Thereafter other attorneys were retained by the plaintiff and pursuant to petition filed in said cause in the Circuit Court of Macoupin County were substituted in the place of defendant as plaintiff's attorneys and the name of defendant was stricken as attorney of record. Thereafter on May 19, 1948, the said Circuit Court dismissed the action for want of equity, which judgment was reversed by the Supreme Court of Illinois and the cause was remanded for further proceedings resulting in a decree entered March 10, 1949, in favor of the plaintiff Jones.

Defendant Hodges, since the attempted termination of his employment as attorney for plaintiff has requested payment for services rendered and at no time acquiesced in his attempted dismissal as attorney for plaintiff.

On the trial of this case the Circuit Judge allowed the motion of defendant Hodges for judgment in his favor at the conclusion of all the evidence and judgment was entered which in effect held that the contract for attorney's fees was valid and that Hodges was entitled to the attorney's fees provided by the prior agreement. The formal written order entered March 14, 1951,

found that the contract as to attorney's fees was valid; that Hodges had complied with its terms; that he was not negligent in the performance of his duties and exercised due diligence in the same and that there was no breach of the contract on the part of the defendant Hodges. The Court ordered that the defendant was to receive the sum of \$80.50 for costs advanced by him and that after deducting this amount from the total recovery had by plaintiff Jones, 50% of the balance then remaining should be paid to the defendant Hodges; that such amount should become a lien on the property of Jones and that the defendant was to have execution therefor.

The evidence in the case does not ^{support} ~~disclose~~ the charges made in his complaint as to negligence, lack of diligence or breach of the terms of the contract. On the contrary, the Circuit Court was adequately justified in finding that defendant Hodges had brought into the conduct of his client's business the legal knowledge and skill common to members of the legal profession, had acted toward his client in good faith and fidelity, and had exercised in the course of his employment with the plaintiff the reasonable care and diligence usually exercised in such cases. As has been often stated in a case such as this where the trial court had the opportunity of seeing the witnesses and listening to their testimony, he was in an excellent position to pass upon the merits of the case and his findings should not be set aside unless manifestly against the weight of the evidence. This Court cannot see that the judgment of the trial court was against the manifest weight of the evidence or contrary to law.

It is argued that the judgment is vague and uncertain and that its amount is not subject to definite determination. Inas-

much as there has been no final determination of the amount of the net recovery to the plaintiff, the trial court could not render judgment in a definite and fixed amount; however, the formula and method of the ascertainment is fixed and certain and provides a method of definite determination of the amount due defendant under the contract.

By reason of the above the judgment of the Circuit Court of Macoupin County is affirmed.

Affirmed.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

Vol. 100, 1002

October 10, 1922

JOHN BARTMAN, as executor of the
will of JOHN BARTMAN, JR.,
Deceased,
Plaintiff-Appellee,

Appellant from the
Circuit Court of Cook County,
Illinois.

JOHN B. BARTMAN, Executor of the
will of JOHN BARTMAN, JR.,
Deceased,
Plaintiff-Appellee,
vs.
RALPH D. BARTMAN and Anna K. Bartman,
Appellants.

This cause came on for trial at the Court House of Cook County, Illinois, on the 10th day of October, 1922.

The circuit court of Cook County, Illinois, rendered its judgment in this cause on the 10th day of October, 1922.

That the defendant-appellee, Ralph D. Bartman, was an executor of the will of John Bartman, Jr., deceased.

On the 10th day of October, 1922, the said Ralph D. Bartman was appointed executor of the will of John Bartman, Jr., deceased.

And that if the said Ralph D. Bartman failed to perform his duties as executor of the will of John Bartman, Jr., deceased, he would be liable to the said John Bartman, Jr., deceased.

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as long as she lived. The payments were to be a lien upon the land conveyed to Ralph D. Bartman and upon the crops thereon. Ralph D. Bartman, upon the execution of the quitclaim deed assumed full control, management and ownership of the property conveyed to him.

Sunkea Bartman died on July 14, 1946 and Koert Bartman, Sr., died on January 19th, 1948. Koert Bartman Jr. is the executor appointed under the will of Koert Bartman, Sr., deceased. While it is neither specifically admitted nor denied, it seems clear that Ralph D. Bartman did not make the payments due on March 1, 1945, March 1, 1946 and March 1, 1947. The executor brings suit for the unpaid annuity payments due on the dates above and asks that the defendant Ralph Bartman be found liable for the amount due under said annuity agreement, together with interest and costs and that the amount so found to be due, with interest and costs, be decreed to be a lien upon the land conveyed to the said Ralph D. Bartman by his father and also upon the crops growing thereon; that in the event the amount was not paid within a time to be fixed by the court that a receiver be appointed to take charge of the growing crops and that if the crops would not pay the amount due, to sell the real estate.

The defendants, Ralph D. Bartman and Anna K. Bartman, husband and wife, filed on August 15, 1949, a motion to dismiss the suit on the grounds that the same matter was in litigation in the Circuit Court of Mason County and that the pending suit in Mason County was a bar to the suit in Logan County. The motion was overruled.

The defendants then filed their answer and a motion to dismiss on July 26, 1950, admitting the defendant Ralph D. Bartman did take full control and ownership of the property at the time conveyed to him by his father and admitting the death of his father. All of the other matters in the complaint were denied. That part of the answer entitled "Motion to Dismiss the Complaint" was ordered stricken. The cause was referred to a Master and the Master held

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a hearing and filed his report finding that Ralph D. Bartman owed the estate of Koert Bartman, Sr., the sum of \$1,000.00 for the year ending March 1, 1945, the sum of \$1,000.00 for the year ending March 1, 1946 and the sum of \$1,000.00 for the year ending March 1, 1947. The Master also found there was due the sum of \$874.97 for the part of the year ending with the death of Koert Bartman, Sr. namely January 19, 1948, with five per cent. interest from the due date of each annuity year up to January 19, 1948 and for costs of suit.

The appellants assign nine grounds as error. Some of the errors assigned are general in language and others are on specific grounds. For the purpose of this appeal, we are grouping them as follows:

1. Was the action pending in Mason County a bar to the present suit?
2. Was the trial court correct in apportioning the annuity to the date of the death of the annuitant?
3. Should decree have been rendered against the wife, Anna K. Bartman?
4. Did the proofs sustain the decrees?

The action then pending in Mason County was a suit by the appellant against his father Koert Bartman, Sr., and Sunkea Bartman, and Kate Diess and Rudolph Diess, his sister and brother-in-law, for specific performance of an alleged oral contract to convey other real estate, or, in the alternative, that a certain annuity and mortgage contract he had executed and delivered to his father be cancelled. The annuity agreement was the same one that is sued upon here. Here the suit is by the Executor of the Estate of Koert Bartman, Sr., for money alleged to be due under that annuity agreement. If there is identity of parties and identity of causes or issues, then it must be conceded that the present suit would be barred. An examination of the issues in the two cases will easily show that there is not such identity either as to parties or issues.

In the Mason County case, the relief sought by Ralph D. Bartman, plaintiff there but defendant here, was for specific performance and to set aside a deed. Here he is a defendant in a suit seeking to collect on a written agreement to pay an annuity. In the Mason County case he sought to have an alleged oral agreement enforced or in the alternative to cancel his written obligation to pay his father an annuity of \$1,000.00 per year. Here he admits that he executed the written agreement for the annuity, the conveyance of the property to him by his father and that he took possession. There can be no question that the deed to Ralph D. Bartman and the annuity agreement, were all a part of one transaction. The annuity agreement shows that the consideration was the transfer of the property to him. There is nothing in the record to sustain the position of the appellants that the annuity agreement was part of any agreement on the part of the father to transfer other property to him. On the other hand, the evidence seems clear that the consideration of the annuity was the transfer of the land in Logan County to him and that alone. The alternative relief sought, would not of itself make the issues or causes identical so as to bar this suit. It is the finding of this court that the causes and issues and the parties of the two suits were not so identical as to bar this suit and without such identity, there can be no bar. Cash v. Maloney, 402 Ill. 528.

The apportioning of the annuity to the date of the death of the annuitant was error. The annuity agreement provided for the payment of an annuity of \$1,000.00 on or before March 1, of each year as long as Koert Bartman, Sr. lived. Koert Bartman, Sr., died on January 19th, 1948. This court in Bell v. Egelhoff 204 Ill. App. 618, said: "If an annuitant dies before the day of payment, his representative cannot claim any portion of the annuity for the current term." Plaintiff herein claims that the contract itself discloses an intention to make the annuity apportionable. We do not think this position can be sustained.

It is true, there are words in the annuity agreement which could make the payment of the annuity to Sunkea Bartman apportionable but Sunkea Bartman predeceased Koert Bartman, Sr., and there is nothing in the agreement to make the annuity apportionable to him. To hold otherwise would be to read into the agreement words that are not there. The same is true as to the contention that where the annuity is a means of support, it is apportionable. Again, the document itself and the record will not support this contention.

Anna K. Bartman is the wife of Ralph D. Bartman. She has and has had since the conveyance to her husband of the land in Logan County, an inchoate right of dower. It is true the prayer of the complaint does not ask for a decree against her. It is true that the Master's report does not recommend a decree against her but she has been in the case from the beginning, because she is the wife of Ralph D. Bartman, the obligor under the annuity agreement, and because she does have that inchoate right of dower. She is a necessary defendant and party since if the land is sold to satisfy the decree, her rights must be extinguished. There is another matter that should be considered. If there was a misjoinder as to Anna K. Bartman, it should have been raised in the trial court. This was not done. There is ample authority that misjoinder of parties cannot be raised for the first time on appeal. Ohio Oil Company v. Daughtee, 240 Ill. 361; Curry v. Cotton, 356 Ill. 538.

Then there is the point raised by the appellant that the proofs do not sustain the decree. We think that they do. There seems to be no question of the written agreement to pay the annuity. There seems to be no question that it was not paid and no claim is made that it was paid. The fact that the annuity agreement does not show the county in which the land was located is not important in view of the fact that the annuity agreement recites that it is made in consideration of the giving of the quitclaim deed and the deed itself, which is in evidence does recite the full and complete description.

A point is made by the appellants that there is no provision

for interest in the annuity agreement. That is true but in the case of Gallaher v. Herbert, 117 Ill. 160, the court there allowed interest on the annuity payments from the time they became due. In that case, as in this, there was no specific provision for interest.

The decree of the trial court is affirmed as to all matters except that part of the decree relating to the payment of the proportionate part of the year of the annuity payment, namely \$874.97 and interest on that sum and as to that part, the decree is reversed and remanded with directions to amend the amount to be paid under the decree to the sum of \$3,000.00 with interest and costs.

Affirmed in part and reversed in part, with directions.

45616

HAROLD G. CHARPENTIER, et al.,
 Plaintiffs - Appellees,
 v.
 CARL KAHN, et al.,
 Defendants - Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

347 I.A. 437

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a suit to rescind a contract for a deed and an escrow agreement, and to recover \$4,000 deposited in escrow. The decree was in favor of the Charpentiers, hereinafter referred to as plaintiffs, and defendant Cowen, escrowee, was ordered to pay over the deposit. Defendants have appealed.

March 21, 1949 plaintiffs, as Charpentier Wood Products, advertised in the Chicago Tribune for a lease of a first floor area zoned for industrial use. Defendants, owners of the premises at 2542 North Lincoln Avenue in the city of Chicago, offered the premises to plaintiffs in response to the advertisement. Early in April while plaintiffs were being shown the premises, defendants expressed a preference for selling rather than renting. On April 18, 1949 a contract for a deed was made and a concurrent escrow was established. The purchase price was \$16,000, the terms of sale requiring immediate payment of \$2,000, another \$2,000 within three days, and monthly payments of \$250 thereafter. The escrow agreement provided that \$4,000, the first two payments under the contract, deposited in

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HAROLD G. CHARPENTIER, et al.,)	APPEAL FROM
Plaintiffs - Appellees,)	
v.)	SUPERIOR COURT
CARL KAHN, et al.,)	
Defendants - Appellants.)	COOK COUNTY.

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As a result, the β values for the β parameters are not significantly different from zero. The β values for the β parameters are not significantly different from zero.

escrow would be disbursable to defendants "in the event Carl Kahn or someone in his behalf causes a change to be made in the zoning ordinance . . . wherein and whereby said premises may be used for light manufacturing purposes. . . ." Plaintiffs were to pay \$500 toward obtaining the variation, and defendants were to share expenses equally should the variation be denied.

On April 20 an application was made to the Zoning Board of Appeals for the variation. April 27 plaintiffs moved into the premises. May 9, the Board of Appeals recommended the variation, and on June 3 it was granted by the city council on condition that any permits for use under the variation were to be obtained within three months of the effective date and were to comply with all other city ordinances. June 10 the Fire Prevention Bureau of the Chicago Fire Department notified plaintiffs in writing to cease operation of the woodworking shop because of noncompliance with the fire prevention regulations. Plaintiffs demanded that the defendants do what was necessary to bring the premises under compliance. Defendants refused on the ground that their contract did not require them to do so. Plaintiffs moved from the premises July 3, and filed this suit August 16.

The issues were referred to a master, on whose recommendation the chancellor found the equities with plaintiffs. The decree nullified the contract for the deed and the escrow agreement, and ordered their cancellation, and

ordered repayment of the deposit. It disallowed \$500 expenses incurred in connection with the zoning variation, \$1,200 moving expenses, and \$566.81 expenses for electrical work.

The ultimate findings of the master, approved by the chancellor, were that the defendants were guilty of fraud in failing to disclose that the premises could not be used for woodworking purposes; that there was not compliance with the defendants' undertaking in the escrow agreement since the variation was limited to manufacture of small wooden boxes and made conditional in other respects; and that plaintiffs gained nothing by the variation because with the structural deficiencies, the use was still not permissible.

Defendants do not contend that these findings are against the weight of evidence or that they are unsupported by evidence. They contend that the findings are not justified by the evidentiary findings of fact approved by the chancellor.

The pertinent findings of fact are that plaintiffs on assurance of defendants that a variation permitting a woodworking shop would be obtained moved into the premises; that though a variation was obtained plaintiffs thereafter were prevented from conducting their business because the premises were not suitable; that defendants thereafter refused to bring the premises into conformity with building regulations; that defendants had had to cease operation of their woodworking shop for the same reason previously; that they knew when they sold the premises that a woodworking

shop could not be conducted there; and that they knew structural changes would have to be made even though a variation was granted.

The variation granted by the city council permitted the operation of a shop for making small wooden boxes on the first floor of the premises. Nevertheless, about a week after its passage the Fire Prevention Bureau notified plaintiffs to cease operation because the premises were not suitable for a woodworking shop under section 63-2 of the Chicago Code. Under that section, a "woodworking" occupancy was defined as a hazardous use not permitted in "any building or any other occupancy except as otherwise provided in Chapter 51 . . . for the purpose of auxiliary to the hazardous use" The variation was conditioned on permits granted thereunder clearing other departments of building inspection, etc. in the city.

The building premises consisted of two stories, the front half of which was frame and the rear half brick, and an attic above the front half. When plaintiffs were shown the premises on April 2, 1949, they observed that the defendants lived in an apartment in the front half of the second floor and had two bedrooms in the attic. They also observed defendants' woodworking shop in the rear of the second floor. The first floor was vacant and was "clear all the way through . . . no partitions, no fire walls."

The record does not show clearly why the Fire Department considered the premises unsuitable nor what was

required to render them suitable. The implication is that a fire wall would have to be built. The question is whether defendants were guilty of fraud in failing to inform plaintiffs that the previous woodworking operation was stopped by the Fire Department and that a fire wall was necessary even though the zoning variation was granted.

We think that the finding of fraud is erroneous. It is undisputed that when plaintiffs purchased the property they knew the operation of a woodworking shop would violate the zoning laws unless a variation was granted. They also knew that any previous operation by defendants of a woodworking shop was a violation. Knowledge of the letter from the Fire Department to defendants might have been an additional warning to plaintiffs but even if there had been a fire wall the zoning variation was essential and plaintiffs knew it.

Plaintiffs were not prudent in making the purchase and moving into the premises on the assurance of defendants that a variation would be granted. This assurance could have been nothing more than an opinion. Had they waited for the granting of the variation, they would then, pursuant to the ordinance, have necessarily had to obtain clearance from the Fire Prevention Bureau and would likely have learned, even if they did not inquire, that the premises were not suitable for the intended purpose.

Plaintiffs had been in the woodworking business before the instant transaction. Presumably they knew the

Chicago Code regulations governing the use of premises in that business, (Carondelet Iron Works v. Moore, 78 Ill. 65), yet they inspected the premises before making the agreement to buy and had noticed the absence of a fire wall. This knowledge should have put them on inquiry as to the authority for defendants' previous conduct of a woodworking shop and their cessation of the operation.

Under these circumstances we are impelled to conclude that the record does not justify the finding of fraud and that the decree is erroneous. Carondelet Iron Works v. Moore, 78 Ill. 65; Greenwood v. Fenn, 136 Ill. 147; Bundesen v. Lewis, 368 Ill. 623.

Plaintiffs rely upon Stephens v. Clark, 305 Ill. 408, and Roper v. Sangamon Lodge Number 6, 91 Ill. 518. In the former, the defense of fraud proven consisted of positive statements misrepresenting the character of the land, --- even though the defendants had inspected in part,---and the use of "by-bidders" at the auction of the property. In the latter, the defense of fraud charged was the withholding of information by the members and officers of a fraternal organization of the previous default of the lodge treasurer who was to be bonded. The court affirmed the sustaining of the demurrer saying: "But the rule [fraud by concealment] does not apply when the defect or important information is as accessible to one person as the other." 91 Ill. at 520. These cases do not stand in the way of the conclusion reached.

The conclusion we have reached requires that the decree nullifying the contract for deed and the escrow agreement be reversed. The reversal of the decree is without prejudice to whatever legal claim plaintiffs may have under the agreement to procure the variation, or otherwise. We expressly refrain from passing upon any such claim.

For the reasons given the decree is reversed and the cause remanded with directions to proceed in accordance with the views expressed in this opinion.

DECREE REVERSED AND CAUSE REMANDED
WITH DIRECTIONS TO PROCEED IN
ACCORDANCE WITH THE VIEWS EXPRESSED
IN THIS OPINION.

LEWE AND FEINBERG, JJ. CONCUR.

Our conclusion is that plaintiffs' suit is without equity. Whatever legal claim plaintiffs may have under the agreement to procure the variation, or otherwise, was accordingly not within the jurisdiction of the chancellor and this opinion should not be construed as having passed on any such claim.

For the reasons given the decree is reversed and the cause remanded with directions to dismiss the bill for want of equity.

DECREE REVERSED AND CAUSE REMANDED
WITH DIRECTIONS TO DISMISS THE BILL.

LEWE AND FEINBERG, JJ. CONCUR.

45673

ROBERT BOGUE, a Minor, by his
mother and next friend, CONSTANCE
BOGUE,

Plaintiff - Appellee,

v.

JOHANNA LARSON, HELEN MYERS, EDGAR
A. SCHEUBERT and CHARLES E. SCHEUBERT,

Defendants - Appellants.)

APPEAL FROM

CIRCUIT COURT,

COCK COUNTY.

348 1.A. 437²

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action brought by a four-year old boy through his next friend. The verdict was in plaintiff's favor in the amount of \$20,000 and judgment was entered on the verdict. Defendants have appealed.

The defendants owned an apartment building, the back of which is adjacent to a north-south alley. Plaintiff's home was across the alley from defendants' building. In the rear wall of defendants' building near the surface of the alley were two metal doors, previously used for the removal of ashes. Plaintiff was playing in the alley and in some way injured his left eye by coming into contact with an iron rod protruding from the metal doors into the alley. The eyeball was lacerated and the loss of sight resulted.

Defendants offered no witnesses at the trial. At the close of plaintiff's case, they made a motion for directed verdict. This motion was denied and after the verdict for plaintiff was returned, defendants made a motion for a new trial which was subsequently withdrawn. The only point raised in this court is the question of law whether there is any evidence tending

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to prove that the negligence of the defendants was the proximate cause of plaintiff's injury.

In considering the question of law presented, we take only the evidence favorable to plaintiff and draw inferences therefrom most strongly in his favor. There is testimony that the iron rod protruding into the alley from the metal doors extended 20" above the surface of the alley. Plaintiff, who was six years old at the time of trial, testified that while playing in the alley he slipped on some "stuff" or "ashes" and "hurt" his eye on the rod.

Defendants claim that the slipping upon the "stuff" was an intervening cause which broke the causal connection between defendants' negligence, which is admitted, and the injury. We disagree. We think that reasonable man might differ on the question whether defendants, as reasonably prudent persons, should have foreseen that children playing in the alley were likely to slip on "stuff" or "ashes" and stumble or fall upon the rod which was negligently permitted to protrude into the alley. Merlo v. Public Service Co., 381 Ill. 300, 317. For this reason, the testimony that plaintiff slipped on the "stuff" or "ashes" was some evidence of proximate cause and the question was properly for the jury.

In Carr v. Lee J. Behl Hotel Corporation, 321 Ill. App. 432, this court affirmed a judgment on a directed verdict for defendant because the "alleged negligent act" of keeping a door, not protruding into the alley on which it faced, unlocked was nothing more than a condition. The act of plaintiff there in slipping on the ice and falling

was said to be the proximate cause. In that case, negligence was not admitted by the defendant and the unlocked door was on private property. Here, defendants' negligence was responsible for the rod protruding into the public alley so as to present danger to the children playing there. In Berg v. New York Central Railroad, 391 Ill. 52, the supreme court affirmed the appellate court which had reversed a judgment on a verdict for plaintiff. Though it approved the principle, employed by the appellate court, of foreseeability on the part of the wrongdoer, it affirmed on the principle that "an injury can not be attributed to a cause unless, without it, the injury would not have occurred." The court said that the collision could have been avoided had it not been for the ice on the roadway on which the car in which plaintiff was riding skidded, and it concluded that the ice was the proximate cause of the injury.

In the instant case, on either principle found in the Berg case, there was testimony tending to prove that the rod was the proximate cause. In plaintiff's favor we take as true the testimony that plaintiff hurt his eye on the rod which was projecting into the alley at a height of 20" above the ground. This is some evidence that plaintiff would not have been hurt had it not been for the negligent maintenance of the rod. We have already pointed out that under the principle of foreseeability, the question of proximate cause was for the jury.

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

LEWE AND FEINBERG, JJ. CONCUR.

1. *Phragmites australis* (Cav.) Trin. ex Steud.

45623

RESTVALE CEMETERY, INC.,
Appellee,
v.
REVEREND CLEO WILLIAMS,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

270 A
341 A. 138

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff obtained a judgment by confession against defendant on a note allegedly signed by defendant. Defendant filed a petition to vacate the judgment and to allow him to defend. The petition alleged that the note sued upon was not signed by defendant and that the purported signature was a forgery. Upon a hearing of the petition, an order was entered allowing defendant to defend, the judgment to stand as security. Thereafter, a trial was had upon the merits, resulting in an order confirming the original judgment by confession and denying the petition to vacate.

The undisputed testimony of defendant is that he did not sign the note sued upon and authorized no one else to sign it for him.

Plaintiff requested and was afforded an opportunity by the trial court to produce evidence by a handwriting expert as to the genuineness of the signature in question, but no such rebuttal evidence was produced.

Upon this evidence the trial judge should have vacated the original judgment by confession instead of confirming it. The judgment of the Municipal Court is reversed and the cause remanded with directions to vacate the original judgment by confession and to enter judgment for defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

KILEY, P.J. AND LEWE, J., CONCUR.

27 A

347 I.A. 4391

45504

VERN E. ALDEN,

Appellee,

v.

HENRY A. STROMSEM, HAROLD J.
STROMSEM and CLEMENS U. BRINKMAN,
Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

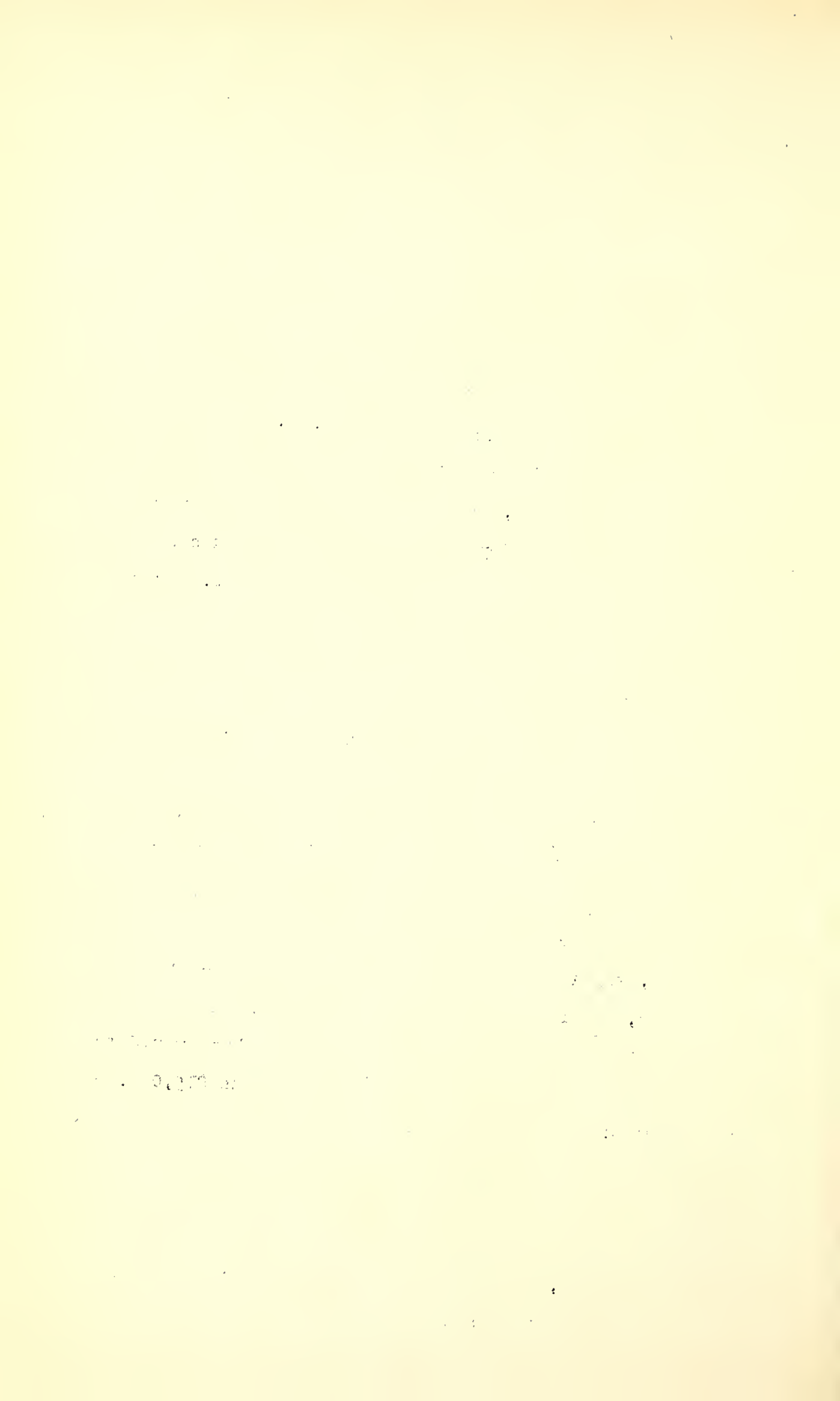
Plaintiff sued to recover engineering fees alleged to be due from defendants. The jury returned a verdict in the amount of \$4746.82 against all the defendants. Separate motions of the defendants Stromsem and defendant Brinkman to set aside the verdict and grant a new trial, were overruled, and judgment was entered on the verdict, from which an appeal has been taken.

It appears from the evidence that in June 1943 Brinkman and the Stromsems entered into a written contract, pursuant to which the Stromsems deposited \$5000.00 to the credit of Brinkman in escrow with the American National Bank and Trust Company of Chicago. The agreement provided that, pending the organization of a corporation for the purpose of engaging in the manufacture and sale of industrial alcohol, that sum would be disbursed to Brinkman as the parties might in writing direct, but that upon the organization of the corporation the balance of the money in escrow was to be delivered to the corporation and the escrow terminated.

The escrow agreement provided that until the presentation of a certificate of incorporation, the funds were

to be disbursed to Brinkman as the parties to the escrow should direct, that upon presentation of a certificate of incorporation issued by the secretary of state of Illinois, the escrowee was to transfer the \$5000.00, or so much as remained thereof, to Brinkman, who in turn was to transfer it to the corporation, and that in the event the certificate was not presented by September 15, 1943, the sums remaining on hand were to be turned over to the Stromsens. Pursuant to these written agreements, \$5000.00 was deposited by the Stromsens with the escrowee, and over a period of time all the funds were disbursed.

As between the Stromsens and Brinkman, their written agreement provided that Brinkman would procure a lease to a brewery known as the Brand Brewery, and that Brinkman would organize a corporation for the purpose of engaging in the manufacture and sale of industrial alcohol; that upon securing such lease, Brinkman would assign it to the corporation, together with certain other personal-service contracts, and receive in exchange therefor the entire capital stock of the corporation; that Brinkman would thereupon cause to be transferred to the Stromsens \$15,000.00 par value of the capital stock issued to Brinkman from the corporation, and that the Stromsens would be entitled to keep \$10,000.00 par value of such stock free of any claims of Brinkman, and that with respect to the remaining \$5000.00 par value stock, the Stromsens had the option either to retain the same or to require Brinkman to purchase that



amount of stock from them for \$5000.00, the par value thereof; that in the event the Stromsens elected to require Brinkman to purchase such shares from them, Brinkman was to be given a period of one year in which to pay for the shares; and that Brinkman was not to be liable to the Stromsens for any monies withdrawn from the escrow but was to deliver an accounting showing that the money had been properly expended for the benefit of the corporation, either before or after its organization.

Alden, an engineer, was a member of a firm consisting of several partners doing business under the name Vern E. Alden. All the engineering work referred to in this litigation was done by that firm. Alden dealt exclusively with Brinkman or with Robert J. Hilliard, an attorney. He was informed that a corporation was to be formed which would take over the project, and all his bills were rendered to that corporation. He never knew or heard of the Stromsens until he saw them in court at the trial of the case, had never talked to either of them or had any communication with them. He testified that "bills were sent to the Chicago Industrial Alcohol Corporation because I was informed that this was a corporate project."

It appears from the evidence that Alden was engaged by Brinkman to do the engineering work on the project on behalf of the corporation proposed to be formed. His original estimate for the work, as disclosed by the evidence, was the sum of \$1175.00, which was paid to him. Later he rendered

an invoice for \$6696.82, less \$1175.00, and claimed a balance of \$5521.82. No bills were ever rendered to the Stromsens or anyone but the corporation. ✓

Brinkman testified that he had become interested in converting the Brand Brewery into an alcohol plant; that he retained Hilliard to act as his attorney, and after conversations with the Stromsens extending over two months, he persuaded them to advance the sum of \$5000.00 as expenses for launching the project; that he specifically told Alden that engineering fees were to be paid for by the corporation, and that pursuant to such conversations all Alden's bills were rendered to the corporation; that he never represented himself to be the agent of either of the Stromsens, and that the Stromsens never made any recommendations about the hiring of Alden. |

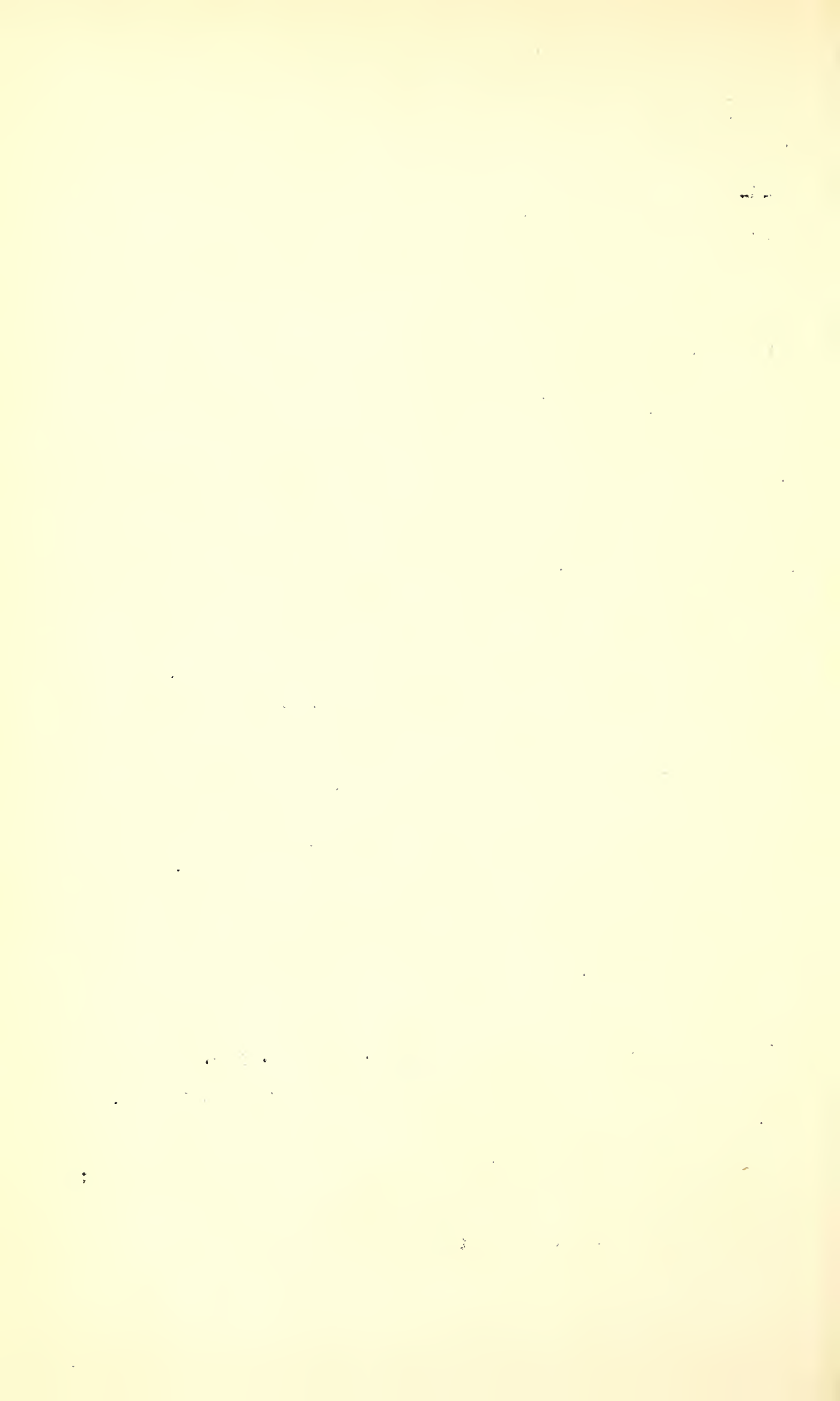
The engineering work of the Alden firm was rendered in connection with drawing up plans for the alteration and conversion of the plant, and also in connection with preparing two applications to the War Production Board for authority to construct the plant at the Brand Brewery according to those plans. These applications were sent to the WPB in Washington, D.C. In July 1944 the board wrote to the Chicago Industrial Alcohol Corporation advising that both applications were disapproved. Shortly prior to the letters of disapproval, the WPB had written to Hilliard stating, among other things, that, because of claims of the War Food Administration, grain supplies were critically short, |

and accordingly the board had, for almost a year and a half, refused approval of any project which proposed any new use of grains.

The complaint alleged that Alden was hired to do engineering work by Brinkman, who was acting for himself and as the agent of the Stromsents. We have examined the record and find no evidence which would warrant the conclusion that Brinkman acted as agent of either of the Stromsents; in fact, the evidence is substantially all to the contrary. The written agreement between Brinkman and the Stromsents does not disclose any such agency, and the oral testimony of both the Stromsents and Brinkman specifically denied such agency. Plaintiff, evidently realizing the difficulty of sustaining his complaint upon that theory, sought recovery on trial of the case upon the theory of joint adventure, and in instruction No. 4, tendered by plaintiff over defendants' objection, the court submitted to the jury the issue of joint adventure as the determining factor in the case. That instruction reads as follows: "You are instructed that when two or more persons are associated to carry out a single business enterprise for profit, their business enterprise is termed a 'joint adventure,' and the parties so associated are termed 'joint adventurers.' If you find from the evidence under the instructions of this Court that the defendants and each of them were associated in the carrying out of an enterprise involving the conversion of the Brand Brewery into a plant for the production of

industrial alcohol, and that they were so associated in the expectation of making a profit thereby, and you further find that the defendants and each of them had some right to direct and govern the conduct of the others in connection with this enterprise, then you are instructed that the defendants and each of them were engaged in a joint adventure. In such case you are instructed that a member of the joint adventure can bind his undisclosed associates by such contracts as are reasonably necessary to carry out the venture." This instruction defining joint adventure is too broadly and loosely framed, and probably resulted in the verdict and judgment from which defendants appeal. No association of any kind is left untouched; whether persons are associated with each other as stockholders, investors, lender-borrower, or trustee-beneficiary, each has some expectation of profit or gain, and each has some control over the co-related party. Under such an instruction, each of the class of persons would be liable for the acts of the others. The instruction does not correctly state the law. "A joint adventure, * * * as well as a partnership, is controlled by the terms of the agreement under which it is formed or created." Harmon v. Martin, 395 Ill. 595. Under the provisions of the Illinois Uniform Partnership Act (Ill. Rev. Stat. 1951, ch. 106 1/2) it is evident that there is no basis for finding that the Stronsens were joint adventurers; they were not partners as to each other, nor as to third persons. Furthermore, a joint adventure requires a common

✓
out of 100
= 97.5



ownership of property, and there was no such ownership by the Stromsens and Brinkman. A joint adventure is further refuted by the fact that there was no sharing of gross profits or returns of the business; the stock which the Stromsens were to receive was supposed to represent their advancement of \$5000.00, and although they were to become shareholders of the corporation and receive dividends on their stock, these circumstances cannot be regarded as indicating that they were to receive a share of the profits of the business in the sense that partners participate in the profits of a partnership. In the early case of Fouger v. First National Bank of Chicago, 141 Ill. 124, it was held that the sharing of profits is a fundamental test in determining whether a partnership or joint adventure exists, and of course the burden of proving the relationship is upon plaintiff, who claimed its existence. Furber v. Page, 143 Ill. 622; see also W. F. Bleck & Co. v. Soeffing, 241 Ill. App. 40, which is somewhat analogous to the case at bar.

As we read the record, the Stromsens, under the written agreement, simply put up \$5000.00 of their money, for which they were to receive stock in the corporation, and in which Brinkman was to be the principal stockholder. The enterprise originated with Brinkman, who needed a small capital to initiate the project, which necessitated, among other things, the use of engineering services. The \$15,000.00 in stock which the Stromsens were to receive should be regarded as nothing more than a bonus for advancing the

initial engineering expenses and to organize the contemplated corporation. As between Brinkman and the Stromsoms, this was a valid agreement, but this did not alter the fact that Alden understood that he was rendering services to a corporation to be formed and in fact rendered all his bills accordingly. In the light of these conclusions we are of opinion that there is no basis in law or in fact for the verdict entered against the Stromsoms, and the court should have directed a verdict in their favor; for failure so to do, the judgment as to them is reversed.

Defendant Brinkman filed a separate brief wherein he relies principally on Alden's estimate of \$1175.00 for the cost of the work to be done by him and his associates. This estimate was contained in a letter dated February 8, 1944 and received in evidence as plaintiff's exhibit 19. On February 2, 1944 Brinkman had had a conference with Alden, at which Hilliard was present, wherein he laid before Alden the proposed conversion of the Brand Brewery. An inspection was then made of the plant, and Alden, in his letter of February 8, 1944, outlined to Brinkman the work that he thought would have to be done and which he recommended for carrying out the preliminary engineering necessary for preparation of the War Production Board applications covering the project. After specifying the various proposed items of work, Alden said: "We propose to do all of the work which is outlined above at twice payroll for the actual time expended on your work, plus the related out-of-pocket

costs for photostats, blueprints, traveling expense and other similar items. We estimate that this total cost will be approximately \$1175." Brinkman contends that Alden is bound by this estimate in writing. He testified that at a February conference he asked Alden what the work was to cost, explaining that he had limited funds and could not afford to have any additional large amounts billed, and was advised by Alden that there was a cushion of three hundred to four hundred dollars in the estimate. ✓

It was apparent from the outset that approval of the applications by the War Production Board would be difficult to obtain because of the shortage of materials, and in his anxiety to consummate the project Brinkman assigned to Alden additional services which he thought would be necessary or helpful. His suggestion for these additional services is contained in a letter of March 19, 1944, also received in evidence. Alden's firm rendered these additional services sought by Brinkman and Hilliard. Plaintiff's exhibit 24 is a document consisting of approximately 100 pages, showing the condition of the brewery, plans for utilization of existing equipment and facilities, report on internal inspection of boilers, preparation of application for authority to begin construction, detailed listing of materials, numerous engineer's drawings outlining the work to be done, as well as plats, surveys, detailed architectural plans and other items. All this evidence was presented to the jury, whose province it was to determine whether or not

additional services were involved and authorized, and the nature, extent and value thereof. In Theis v. Svoboda, 166 Ill. App. 20, it was held that, although the original written contract provided that all extras had to be ordered in writing, the owner nevertheless could waive this condition and by himself ordering the extras become liable by his own acts to pay therefor. To the same effect, see the early case City of Elgin v. Joslyn, 36 Ill. App. 301. After a careful examination of the record, we have reached the conclusion that the verdict of the jury is not against the weight of the evidence.

The only other point urged by Brinkman is that the court erred in the admission of privileged communications between Hilliard and Brinkman. The nature of the relationship between Brinkman and Hilliard was such as to involve almost wholly matters of business rather than of law. Much of what was testified to was disclosed by both Hilliard and Brinkman on a previous trial between them for attorney's fees. We do not think the communications were privileged, but if they were, their character as privileged communications disappeared on the earlier trial.

For the reasons indicated, the judgment against Brinkman should be affirmed, and it is so ordered.

JUDGMENT AGAINST HENRY A. STROMSEM
AND HAROLD J. STROMSEM REVERSED;
JUDGMENT AGAINST CLEMENS U. BRINKMAN
AFFIRMED.

Burke, P. J., and Niemeyer, J., Concur.



45721

222 EAST CHESTNUT STREET CORPORATION,
a corporation,

Appellant,

v.
W. PHILIP McNULTY,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

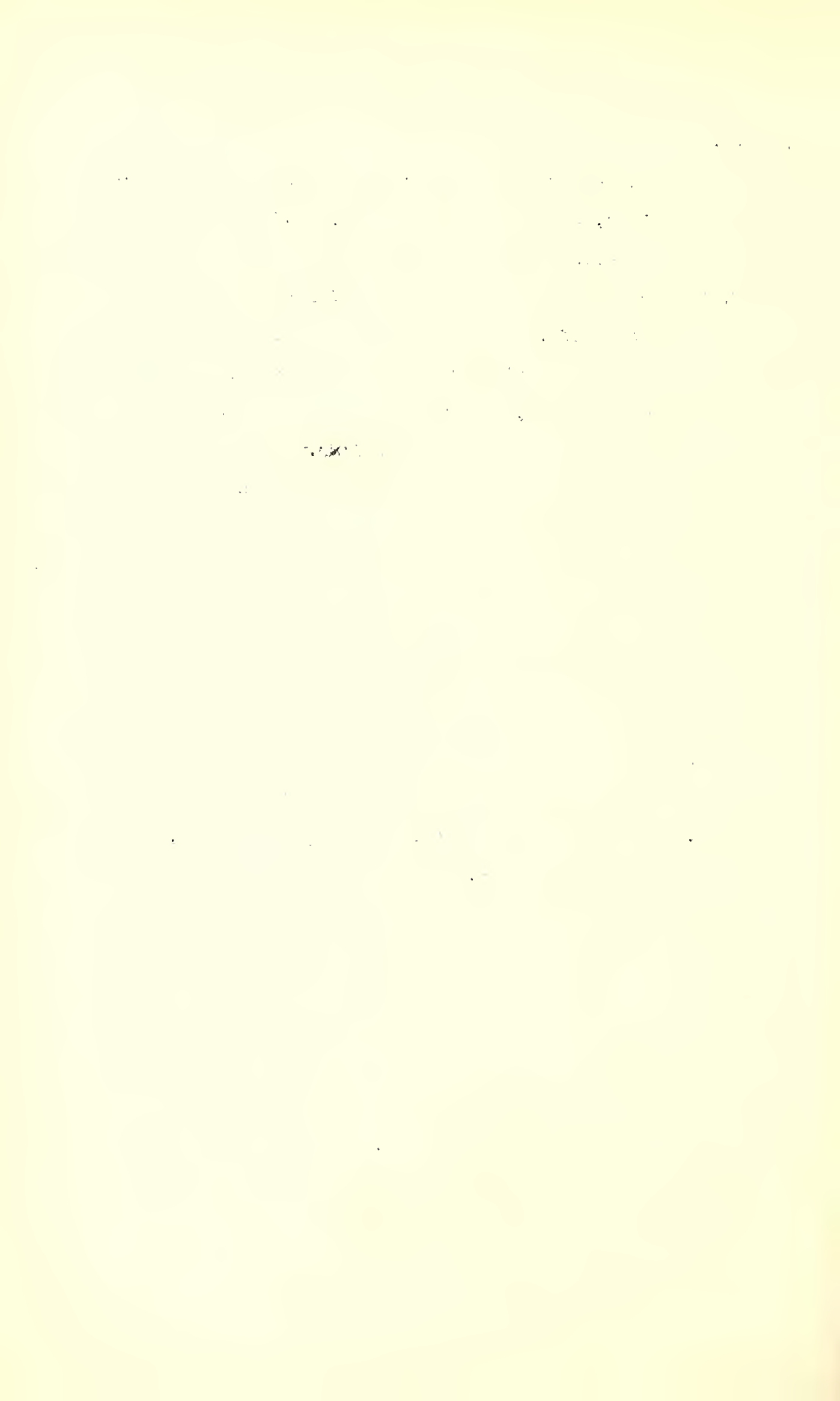
Plaintiff brought suit against defendant to recover monies expended by it for attorney's fees and expenses in recovering possession of an apartment leased to defendant in plaintiff's apartment building. In the written lease for the term July 2, 1947 to December 31, 1948, lessee agreed to pay all costs, expenses and attorney's fees incurred or expended by lessor because of any breach of the covenants and agreements of the lease by lessee. During the term of the lease and while still in possession of the apartment, defendant had made a property settlement with his then wife in which he agreed, in the event of a divorce decree in a divorce proceeding then pending against him, that he would vacate the apartment by March 31, 1948 and turn over possession to the wife. Pursuant to this settlement agreement, a decree was entered providing, inter alia, that defendant should vacate the apartment not later than the aforesaid date and that the divorced wife should have possession of the apartment commencing April 1, 1948 and until the expiration of the lease.

Defendant's lease contained a clause in the usual form which provided that the premises should not be occupied

in whole or in part by any person other than lessee, and that lessee should not assign the lease nor permit to take place by any act or default of himself or any other person, any transfer by operation of law of lessee's interest. After the divorce decree was entered and in pursuance of the property settlement made, defendant shortly prior to March 31, 1948 vacated the premises, and his divorced wife continued in occupancy. She tendered plaintiff the rent for April 1948 which plaintiff refused on the ground that she was not lawfully in possession and that it could not recognize her as lessee. Thereafter, on April 12, 1948, plaintiff served a formal notice on defendant reciting the clause of the written lease prohibiting the assignment thereof, etc. by the lessee of his interest, reciting further the clause of the written lease that, in the event of the breach of any covenant, lessee's right to the possession of the premises should terminate without notice or demand, and reciting further that the premises were now occupied by some person or persons other than defendant in violation of the conditions of the lease. The notice concluded by notifying defendant that his right to possession was thereby immediately terminated and directing him to surrender possession of the premises to plaintiff, and advising him that in the event of his failure so to do, legal proceedings would be instituted to recover possession, and that he would be held liable for court costs, attorney's fees and other charges and expenses of such proceedings, in accordance with the terms of the lease.

Upon defendant's failure to surrender possession of the premises, plaintiff on April 24, 1948 brought forcible-entry proceedings in the Superior Court, joining as defendants W. Philip McNulty, the lessee, and Veldae Pearce McNulty, the divorced wife. McNulty defended on the ground that he had vacated the premises and was not a proper party to a forcible-entry suit, and upon his motion the cause was dismissed as to him. The divorced wife defended on the ground that she was entitled to possession of the premises. Plaintiff had employed Stephen Love of the Chicago Bar to represent it in the proceedings. The case, tried in the Superior Court, resulted in a judgment for possession against the divorced wife on July 2, 1948; that judgment is now in full force and effect, no appeal having been taken therefrom. Plaintiff paid Mr. Love, for attorney's fees, court costs and court reporter, a total of \$304.05, and in the instant suit alleges that the itemized costs making up this total were fair, reasonable and customary charges and relies, for the recovery of that amount, on the provisions of the lease that lessee should pay and discharge all costs, expenses and attorney's fees incurred or expended by lessor due to breach of covenants and agreement of the lease by lessee.

In due course defendant filed his original answer to the complaint; plaintiff's motion to strike the answer was sustained by an order entered June 22, 1950, and he had leave to file an amended answer. Plaintiff filed a written motion to strike the amended answer, and when the matter



came before the court for hearing on that motion on June 25, 1951, the court not only overruled plaintiff's motion to strike but, without defendant prior thereto having any written motion to strike plaintiff's complaint, the court ordered that the motion be carried back and that the complaint be dismissed. Plaintiff appeals from that order.

Upon the merits defendant contends that in consideration of the execution of the lease by him plaintiff agreed that the apartment could be occupied by his family. Mrs. McNulty was not a party to the lease. Conceding that during her marriage she was a member of his family and entitled to occupy the apartment with him, when the divorce decree was entered on March 19, 1948, she ceased to be his wife and she also ceased to be a member of his family and to have any rights to occupy the apartment.

Another defense interposed in the amended answer avers that after defendant vacated the premises, plaintiff received rental from his divorced wife for the period from April 1, 1948 to October 31, 1948, and it is urged that inasmuch as plaintiff failed to file any reply to defendant's affirmative answer, this defense must be accepted as true, the contention being that by accepting rent from defendant's wife for that period, plaintiff waived all prior breaches of the lease. The amended answer alleges that "Plaintiff received rental from said Veldae Pearce McNulty for the period from April 1, 1948 to October 31, 1948 at the rate of \$149.50 per month, which is the monthly rental stipulated in said lease." The amended answer does not allege that payment was received before the

judgment; it merely alleges that it was received, without saying when. The payment of rental for the period from April 1, 1948 to October 31, 1948 was evidently made immediately after the judgment for possession was entered on July 2, as indicated by the following provision in the judgment order entered that day: "The defendant, Veldae Pearce, formerly known as Veldae McNulty, having made payment unto the plaintiff for the use and occupation of the said premises at the rate of \$149.50 per month for the period to and including June 30, 1948, It Is Further Adjudged that she may continue to pay to the plaintiff during her use and occupancy of the said premises for the period from July 1, 1948 to September 30, 1948, at the rate of \$149.50 per month; the acceptance of the said payments and for use/occupation shall be deemed to be without prejudice to the plaintiff's right to have the said writ of restitution issue as aforesaid, and shall be deemed not to create a new tenancy, nor any landlord and tenant relation (other than merely permissive use) between the said defendant and the plaintiff with respect to the premises above indicated." It thus seems clear that the alleged payments for rent were not received before July 2, 1948, when judgment for possession was entered. Obviously, if the payments had been made prior to July 2, they would have sufficed to defeat the forcible-entry proceedings. If plaintiff had been given an opportunity to reply to defendant's affirmative answer, it could have set forth these circumstances and thus refuted the contention that, by accepting rent from defendant's wife from April to October 1948, plaintiff waived all prior breaches of the lease.

Plaintiff concedes that on a motion to strike an answer, the court may consider substantial defects in the complaint; but it seems to us that the complaint was sufficient, that it set out a good cause of action, and that the court erred in dismissing the complaint.

Accordingly, the order of dismissal is reversed, and the cause is remanded for further proceedings not inconsistent with the views herein expressed and for a hearing on the merits.

ORDER REVERSED AND CAUSE REMANDED.

Burke, P. J., and Niemeyer, J., Concur.

277 A

45724

SILVIO E. PIACENTI,

Plaintiff - Appellant,

v.

WILLIAMS PRESS, INC., WILLIAM E.

WILLIAMS and ROBERT A. MEIER III,

Defendants - Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

347 I.A. 440

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a libel suit arising from a political campaign for the office of Police Magistrate in Chicago Heights, Illinois. The court dismissed the complaint on motion of defendants and entered judgment accordingly. Plaintiff has appealed.

The complaint was filed March 26, 1951. Its well-pleaded allegations are admitted by the motion to strike. Plaintiff was Police Magistrate of Chicago Heights when suit was filed. He had been incumbent since 1943 and was a candidate for reelection at the election to be held April 3, 1951. Defendant Meier was plaintiff's opponent at the election. Defendant Williams was general manager of The Chicago Heights Star, owned by defendant Williams Press, Inc.

The suit is based on alleged false and defamatory matter which plaintiff states was maliciously published by defendants in the Star during the campaign. The article appeared on March 20, 1951 on the first page of the Star in an article carrying a picture of Meier. The article is headed, "Meier Scores Secrecy in Police Court" and consist of five paragraphs.

The motion to strike asserted that the article was not libellous per se and that the facts alleged do not justify the innuendo enlarging the meaning of the words; that being a candidate for elective office, plaintiff invited comment by other candidates; and that the article was fair comment to inform the public.

Plaintiff contends that the question of fair comment was not presentable in the motion but is a matter of defense. This question may be presented by the motion, where it appears from the complaint that the article reported and commented upon a matter of public interest. Dilling v. Illinois Publishing & Printing Co., 340 Ill. App. 303.

The trial court decided as a matter of law that the complaint stated no cause of action. If either ground of the motion justified the decision, the judgment should be affirmed. ✓

The complaint is in five counts. In count I, plaintiff complains that the following words in the article:

"With the exception of occasions when he was literally forced to by council action, Police Magistrate Sylvio E. Piacenti has considered regular monthly reports to the city as unnecessary."

were intended to refer to him and were reasonably understood by the reading public to mean that plaintiff had violated his oath of office in failing to obey the laws of Illinois and of Chicago Heights, and his compliance with the law was not voluntary but compulsory. We think the only reasonable construction of the words is that plaintiff considered the reports unnecessary. Plaintiff could comply voluntarily with the law in this respect and still with propriety consider the reports unnecessary.

He also complains in this court of the following words:

"In short, Piacenti has constantly taken the position that what goes on in his office is none of the public's business."

He alleges that these words were intended to mean and were reasonably understood by the reading public to mean that he was violating an Illinois statute which required that the docket be open to the public at all hours and that the words would be understood as meaning that plaintiff was conducting the office as a private business instead of a public office. We think the only reasonable construction of the words is that plaintiff takes the position that what goes on in the office is none of the public's business. There is no charge that he violated the statute, nor could a reasonable person infer that charge from the words used. Plaintiff could comply with the statute and still take the position attributed to him.

He complains too in count I of the following words:

"Yet the office has been a fee office where serious cases could be decided upon the whim of the magistrate who could at will levy such court costs as suited him without thought of fines that rightfully belonged to the city."

Plaintiff alleges that this was intended to mean and was reasonably understood by readers of the Star to mean that he was guilty of malfeasance by enriching himself by excessive fees contrary to the statute, and that he was conducting the office for personal gain in disregard of his duties. We think the word "could" rendered the language impersonal for the reasonably intelligent reader. That a magistrate could levy costs as suited him without thought of fines that rightfully belonged to the city refers to levying fines, not

-4-
keeping them, and does not warrant a reasonable inference that plaintiff enriched himself by taking fees.

He complains further in count I of the following language:

"Attorney Meier then reiterated his suggestion that the police magistrate's office should be placed on a salary basis thus eliminating a source of temptation for an unscrupulous incumbent [meaning the plaintiff, Silvio E. Piacenti] and returning the office to the services of the city for which it was intended."

The parenthetical phrase does not appear in the article but was inserted by the plaintiff in the complaint. The reasonably intelligent reader would not be justified in concluding from those words that plaintiff succumbed to the temptation and was guilty of malfeasance. The word "an" makes the language impersonal. The sentence contains a candidate's recommendation for a reform which would return the office to services for which it was intended. The word "return" implies that the office had not been put to that service, but does not say what the disservice was or what the service intended was, and does not charge plaintiff with disservice or the "crime of malfeasance."

Plaintiff complains of the following excerpt from the article:

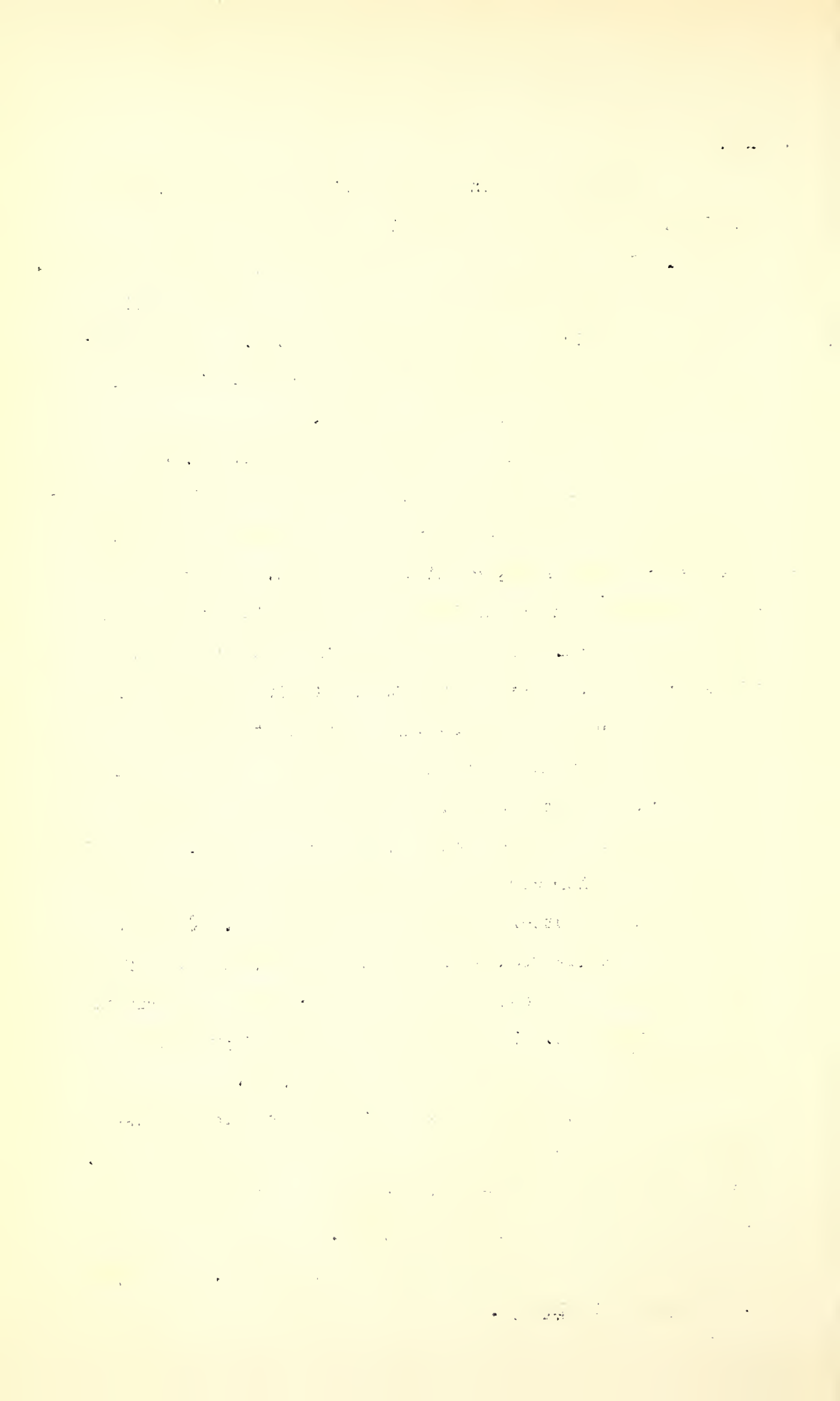
"Attorney Meier stepped up his campaign during the week-end, canvassing many civic leaders in the hope of arousing their interest in a need for a change in what he calls 'slipshod and politically conniving methods' practiced by his opponent."

There is no charge that these methods are connected with the office of Police Magistrate, nor are the words reasonably construable as such a charge.

Another portion of the article of which plaintiff complains promises what Meier will and will not do if elected. The implications of the statement, plaintiff alleges, are that he hid records, and was guilty of unlawful and unethical practices in the profession of law. These **could not** be inferred by reasonably intelligent readers. We see no basis for complaining of this language.

The foregoing allegations are realleged, by reference, in the remaining four counts. Count I charges that the article was published by all the defendants and injured plaintiff's "good name, credit, reputation, and profession and occupation" in the office of Police Magistrate and the profession of law. Count II charged that Meier made the utterance to the other defendants and their agents knowing the words would be published and intending that they be published. Count III charged the defendants with conspiracy to utter and publish defamatory matter and the carrying out of the unlawful purpose under a motive of revenge. Count IV charged that Meier composed the defamatory matter for publication and the other defendants published it. Count V charged that Meier requested the other defendants to publish the defamatory utterances and that the request was granted by the publication. In each count, plaintiff prays for compensation and punitive damages of \$200,000.

We think there is no basis whatever for a conclusion that the words of the article are libellous per se. This will appear from our analysis of the excerpts of the article as set forth in the complaint. The plaintiff does not rely upon the published words in themselves. Parmelee v. Hearst Publishing Co., 341 Ill. App. 339. In each



instance he relies upon allegation of innuendo. Neither is the language susceptible in itself of meaning that plaintiff has been guilty of a crime.

Our analysis discloses that the language of the article is unambiguous and the question whether the entire article, including the headline, was susceptible of the meaning attributed to it was for the court. Parmelee v. Hearst Publishing Co., 341 Ill. App. 339; Dilling v. Illinois Publishing & Printing Co., 340 Ill. App. 303; Life Printing & Publishing Co. v. Field, 324 Ill. App. 254. In our opinion, the court properly decided that a reasonably intelligent reader of the newspaper could not understand the words to mean what plaintiff alleges they were understood to mean. The motion to strike did not admit meanings ascribed by unwarranted innuendoes. Herrick v. The Tribune Co., 108 Ill. App. 244.

Words alleged to be libellous will receive an innocent construction if they are reasonably susceptible of it. Parmelee v. Hearst Publishing Co., 341 Ill. App. 339. The entire article in the Star is not reasonably susceptible of the meaning that what is said of plaintiff is said of his character as a member of the legal profession or as a public officer. Cases cited by plaintiff to this point are therefore not applicable. Even if the language was susceptible of that meaning, the allegations of special damage are too general to be aided by the motion to dismiss. Parmelee v. Hearst Publishing Co. The language cannot reasonably be construed to charge plaintiff with violation of his oath of office or of Illinois or municipal law, malfeasance or dishonesty.

-7-

It is our conclusion that the trial court did not err in deciding that the complaint did not state a cause of action. The judgment is affirmed.

JUDGMENT AFFIRMED.

LEWE, J., AND FEINBERG, J., CONCUR.

Extract

STATE OF ILLINOIS

APPELLATE COURT

THIRD DISTRICT

MAY TERM, A.D. 1952

General No. 9829

Agenda No. 6

People of the State of Illinois ex rel.
Lloyd R. Dickerson,

Plaintiff-Appellee,

vs.

Earl Smith et al, Commissioners of the
City of Decatur, et al.,

Defendants.

#

City of Decatur, a Municipal Corporation,
et al,

Appellants.

347 I.A. 555

Appeal from

Circuit Court of

Macon County

Wheat, J.

This action, in effect, is to obtain salary allegedly due as a fireman, from the City of Decatur, Illinois, by petitioner Lloyd R. Dickerson. The Circuit Court entered judgment in favor of petitioner in the sum of \$3325.00, from which this appeal is taken.

A statement of the case is simple as there is practically no dispute between petitioner and the City as to the facts. As all questions of relief prayed for in the petition for writ of mandamus are now moot except that of compensation, this opinion will be limited to that subject. The claimed compensation is for the period between November 1, 1939, and May 31, 1941. Chronologically, the factual situation appears to be as follows:

(1) For more than forty years the City of Decatur maintained a Fire Department under an ordinance providing that the number of its personnel shall be as "the city council may from time to time,

March 6, 1910

Dear Sir,

My dear Sir,

I have the honor to acknowledge the receipt of your letter of the 2nd inst.

and in reply to inform you that the same has been forwarded to the proper authorities for their consideration.

I am, Sir, very respectfully,
Yours truly,
J. H. [Signature]

Very truly,
J. H. [Signature]

I have the honor to acknowledge the receipt of your letter of the 2nd inst.

I have the honor to acknowledge the receipt of your letter of the 2nd inst.

I have the honor to acknowledge the receipt of your letter of the 2nd inst.

I am,

I have the honor to acknowledge the receipt of your letter of the 2nd inst.

I have the honor to acknowledge the receipt of your letter of the 2nd inst.

I have the honor to acknowledge the receipt of your letter of the 2nd inst.

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I have the honor to acknowledge the receipt of your letter of the 2nd inst.

by ordinance or resolution, provide."

(2) More than twenty years ago the City of Decatur adopted the Commission form of government. (This has no relevancy to the issue of the case but merely determines the proper defendants in the suit).

(3) On April 16, 1935, the City of Decatur adopted the provisions of an Act of the Legislature to provide for the appointment of a Board of Fire and Police Commissioners. (There is no dispute as to the power of such Board to conduct examinations, employ and discharge firemen. The question relates to the matter of determination as to the existence of an alleged vacancy and the filling thereof).

(4) On October 30, 1939, the name of petitioner was on the list, pursuant to examinations, from which all persons eligible were certified by said Board to serve as a fireman.

(5) On October 30, 1939, a fireman was discharged. On the same day the Board notified petitioner in writing that he was appointed as a fireman.

(6) On November 1, 1939, petitioner reported to commence his duties as fireman, but was not assigned to perform such. No other fireman was employed until petitioner was appointed June 1, 1941.

(7) On June 27, 1940, an ordinance was passed by said City providing for a definite number of fireman.

(8) On June 1, 1941, petitioner began his duties as a fireman by virtue of appointment by the Board on May 28, 1941. He received no compensation from November 1, 1939, to May 31, 1941. Had he received a salary such would have amounted to \$3,325.00. He resigned June 13, 1948, and re-activated his original suit filed January, 1940. No explanation appears in the record as to why such suit was not dismissed during such eight and a half year interval.

1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 84

The sole question seems to be this: When no ordinance exists determining the number of fire department personnel, has the Board of Fire and Police Commissioners power to employ a fireman? Petitioner answers in the affirmative, urging that because a fireman was discharged a vacancy was obviously created. Respondent City argues that it alone had the power to determine the number of firemen it chose to employ, but agrees that when such choice is made the power of examination and appointment is in such Board. Neither petitioner nor respondent has been able to cite a pertinent case as precedent. This results ~~from~~ ^{IN} the conclusion that this is an exceptional and unusual case, suggesting that perhaps such City never, prior to June 27, 1940, had a legally constituted fire department to the extent that the Board of Fire and Police Commissioners had any duties or powers as to firemen and that such City never had any legal power to appropriate money and levy taxes to support such a vague and unstable department of municipal government. Subsequent to the passage of the ordinance of June 27, 1940, the City was legally empowered to appropriate money for its fire department and levy taxes therefor. The Board of Fire and Police Commissioners thereafter knew the number of authorized personnel^N and should a fireman resign or otherwise be removed from the roll, no question could arise as to the existence of a vacancy, or of the power of the Board to fill the same.

It is the opinion of the Court that as of October 30, 1939, and until June 27, 1940, the members of the fire department of the City of Decatur were not officers of the City, but employees, and that the number of such was a matter of determination by the City officials; that the Board of Fire and Police Commissioners could only appoint such employees for fire department services as should be designated by number and not by name, by the City officials.

By reason of the foregoing the judgment of the Circuit Court is reversed.

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45603

JOHN CORSO,

Appellee,

v.

FRED KNAPP, ARTHUR DOYLE

and RUDOLPH DIOGNARDI,

individually, and d/b/a

WEST END BOWLING ALLEY,

Appellants.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

343 I.A. 556¹

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Plaintiff obtained a verdict and judgment for \$10,700 for personal injuries sustained by him while a patron of defendants' bowling hall on September 19, 1947. He was an employee of the Crane Company and a member of a bowling league comprised of employees of that company. The league was holding a meeting in defendants' hall on the night in question, and plaintiff, who had been a frequent patron of that hall and was familiar with it, was playing with one of the teams. He left his bowling alley to visit with other bowlers and on his return proceeded to ascend two steps leading to his alley. On one of the steps a pool of beer or other liquid had collected. He slipped and in falling threw out his left hand to save himself. His hand came in contact with beverage glasses standing in a rack on the back of a settee in front of the alleys and was severely injured. One of plaintiff's witnesses testified that about twenty minutes before the accident, he noticed this pool on the step and asked a cleaning woman in attendance to clean it up, and she said she would do so. The evidence also showed that the rack in the back of the



settee was made to hold glasses of beverage served to patrons; that on the occasion in question the rack was overloaded; that the glasses were set in haphazardly, and that some of them were cracked and broken. It was plaintiff's theory that beer spilled over from these broken or overstacked glasses onto the floor, creating the pool.

The complaint alleges grounds of negligence as follows:

1. That defendants permitted the steps in question to be in a worn, slippery, dangerous and unsafe condition and that they allowed the steps to remain thus dangerous by reason of the fact that patrons in the alley and from the bar in the alley caused beer and liquor to be spilled upon the steps.

2. That defendants negligently allowed beer glasses to be and remain in racks which were built into a circular seating arrangement for bowlers; that these glasses were set in the racks haphazardly by patrons and that some of them were cracked and broken.

It is contended by defendants that plaintiff has not proved a case in accordance with the allegations of his complaint; and that plaintiff himself testified that the general condition of the steps, outside of some liquid on them, was good. What plaintiff relies on as establishing the dangerous condition of the steps is the fact that there was a pool of liquid on one of the steps and that it was on this pool that he slipped. We will later discuss the testimony which we think was adequate to prove this condition.

With respect to the specific charge that the steps were rendered unsafe by reason of some patrons having spilled beer and liquor on them, defendants argue that there is no testimony to support the fact that the liquid on the step was beer and liquor, or to show what it might have been. It is admitted that there was ample testimony that seven or eight glasses were piled into a rack made for only six; that some of the glasses were broken; and that one witness testified he saw the overloading of the rack and asked the bartender to remove the glasses.

Defendants make the argument that there is no proof that plaintiff slipped on the pool or puddle. The testimony of plaintiff is as follows:

"In going up [the steps] I put my left foot forward and I slipped and fell forward. In falling I tried to break my fall and I reached out to grab the back of the bowlers' seats, and as I came down, I struck a glass with my left hand. Then I landed on my side, rolled over and blood was squirting out of my wrist. As I lay on my back, 4 or 5 fellows came around. One of them grabbed my wrist and put pressure on it to try to stop the bleeding and another fellow picked me up. When I was picked up I looked to see what I had slipped on and there was a puddle which was about the center of the first step. It was some kind of a liquid substance."

Defendants argue that if the language in italics is examined carefully, it will reveal that plaintiff did not testify that he stepped in the puddle when he slipped, but only that when he was picked up, he looked and saw a puddle of liquid substance on the step. It is our opinion that by any fair and reasonable understanding of words, plaintiff's testimony constitutes direct evidence that he slipped on the puddle. The evidence sufficiently conforms to the

allegations in the complaint and supports the general charge that defendants negligently permitted the steps to be in a slippery, dangerous and unsafe condition. There is no proof that the steps were worn, but it is not necessary that plaintiff prove every allegation of that general charge.

Defendants cite Buckley v. Mandel Bros., 333 Ill. 368, as supporting their position that the evidence does not support the allegation of the complaint. In that case, a truck came out of a private driveway onto a highway and was struck by a motorcycle. The complaint alleged that the truck ran into and struck the motorcycle. The Supreme Court, in adopting an opinion reported to it by a Commissioner, as was the practice for a short time, held that the evidence did not tend to prove the averment of the complaint with respect to the cause of the collision. The difference between that case and the one at bar is obvious and needs no comment. Moreover, with the passage of the Practice Act and the more liberal attitude of courts toward pleadings, we doubt very much that this would be the ruling of our Supreme Court today. Other cases cited by defendants on this point are equally distinguishable.

Defendants say that a slippery playing shoe which plaintiff wore was the cause of his falling. They do not contend that there was any contributory negligence on the part of plaintiff in his wearing of a slippery shoe. This is customary bowlers' equipment and when defendants opened their bowling alley and accepted patrons, they did so knowing

that would be the standard equipment of bowlers and that, therefore, the care which they were required to exercise in operating a bowling alley would be such care as duly took that into account. They recognize this, but make the argument that it is a probable inference that plaintiff fell because he slipped by reason of his wearing the slippery shoe and not on the puddle. However, as we have heretofore stated, it is our opinion that plaintiff's testimony, properly construed, is direct evidence that he slipped by reason of his stepping in the puddle. Plaintiff's testimony is corroborated by the testimony of other witnesses with respect to the existence of the pool and the fact that it had been for some time at the place where plaintiff says he saw it immediately after his fall.

Defendants contend that instruction No. 11, given at plaintiff's request, was erroneous. This instruction is as follows:

"The jury are instructed that the plaintiff must, in order to obtain a recovery upon proof of ordinary negligence of the defendants, first show that he was in the exercise of due care for his own safety. By this is meant that he shall have acted as an ordinarily prudent person, that is, as a reasonable person would have acted under all the circumstances; and if you find from the evidence that plaintiff did nothing that a normal person would not have done under the circumstances, then you shall find that he was free from contributory negligence and in the exercise of due care."

The particular portion of the instruction objected to is that part which plaintiff added to the words generally used to define reasonable care required of a plaintiff. Why plaintiff did not use the instruction always used to define the ordinary care required of a plaintiff, we do not know.

However, that language when taken in connection with all the language of the instruction was harmless.

Defendants also allege that they were prejudiced by the improper argument of plaintiff's attorney. At the time of the accident defendants had in their employ a woman whose duty it was to assist in serving food and beverages to bowlers, to remove bottles and glasses, and generally to keep the place clean. She was on duty the evening of the accident. She had been in defendants' employ for about two and one-half years, but had left their employment about a year before the trial. One of plaintiff's witnesses testified that he had called the attention of this woman to the liquid on the steps and asked her to clean it up. Thus it appears from the evidence that this woman was a material witness. Defendants did not produce her but instead called her daughter to explain why the woman was not present, and she testified that her mother was suffering from a nervous breakdown and was staying in Morgan Park. In commenting on this evidence, counsel for plaintiff said that taking into account the vigorous manner in which defendants defended this lawsuit, they should have brought in a doctor to testify as to the woman's condition. If defendants had not undertaken an explanation of why she was absent, then the cases to which defendants refer might have been in point, but defendants having undertaken to explain why the witness was not present, plaintiff had the right to comment upon what he considered the inadequacy of that explanation.

We again repeat what has been frequently stated by all courts called upon to pass on jury trials--that no jury trial is free from error. This one seems to have been well tried and substantially free from error, and the verdict of the jury amply sustained by the evidence. The judgment rendered thereon is hereby affirmed.

Judgment affirmed.

Robson, P. J., and Tuohy, J., concur.

approved
B. J. Chelmsford

2883

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Abstract

General No. 10599

Agenda No. 8

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

May Term, A. D. 1952

RUBY BUSHAW,

Plaintiff-Appellee

vs

CENTRAL ILLINOIS ELECTRIC AND
GAS COMPANY, a Public Utility
Corporation,

Defendant-Appellant

APPEAL FROM THE

CIRCUIT COURT OF

WINNEBAGO COUNTY.

Dove, P.J.

The complaint in this case consists of one count and after averring that the plaintiff was a passenger on a bus owned and operated by the defendant on the evening of December 29, 1950 and was in the exercise of due care for her own safety, charged that the bus upon which she was riding had two doors on the right-hand side, one at the front and the other towards the rear; that as the bus approached the intersection of East State Street and Sixth Street in the city of Rockford the plaintiff signalled the driver of the bus to stop; that the driver acknowledged her signal; that the bus did stop with the rear door of the bus east of the east cross-walk on Sixth Street; that the area opposite the door of the bus and on the curb of the street

was covered with a deep pile of snow and ice and the street beneath this door and between the door and the curb was rough, rutty, and uneven and covered with ice and snow; that the servant of the defendant opened the rear door of the bus; that it was night time and the plaintiff was not aware or conscious of the condition of the street; that as the plaintiff attempted to alight from the bus, she stepped onto the icy, rutty, rough, irregular and uneven surface of the street, and as a direct result of the negligence of the defendant in stopping the rear exit door of the bus at the place aforesaid, the plaintiff in attempting to alight from the bus stepped from the well of said exit door onto the icy and uneven surface of the street and upon and against a pile of snow and ice with her left foot and her left foot slipped and doubled beneath her causing her to fall and fracturing her left ankle.

The answer of the defendant admitted the operation and ownership of the bus and that plaintiff was a passenger thereon at the time alleged and denied the other averments of the complaint. It stated affirmatively, however, that the intersection in question was that of State and Fifth Streets and alleged that where the bus stopped upon the occasion in question was a regular bus stop. The issues thus made by the pleadings were submitted to a jury, resulting in a verdict in favor of the plaintiff for \$2500.00. The trial court, after denying the reserved motions of the defendant for a directed verdict and after denying defendant's motion for judgment notwithstanding the verdict and after denying defendant's motion for a new trial, rendered judgment on the verdict, and defendant appeals.

There is no conflict in the evidence. The plaintiff testified that she is a resident of Rockford, forty-five years of age, and employed at the time of the accident; that she boarded the bus on the evening in question at Ninth Avenue and 20th Street, intending to get off at the intersection of North Fifth and State Street; that she sat in the second seat from the back door on the right side; that there were no other persons in the bus and before she got to the Fifth and State Street intersection, she pulled the buzzer, got up from her seat, and stood at the back door of the bus until it stopped; that when the bus stopped the back door was open and she was facing North toward the north curb on West State Street. She then testified: "The first thing that took my eye was a snow-bank and then I stepped down to the first step with my right foot and then stepped down on my left foot. I slipped on the ice. My foot slipped toward the bus - kind of a slant. When I stepped from the bus I was watching the snowbank. There were ruts there. As I slipped I sat on the snowbank and noticed ruts and snow. When I stepped down with my left foot I slid and fell on my ankle. The accident actually happened as I was stepping off the bus. The condition of ice or ruts was common over the whole area where the bus stopped. As you looked toward the west the condition extended clear up to and across the sidewalk and out into Fifth Street. It was the same right in front of the sidewalk. I did not have any difficulty seeing it as I sat there. As I stood in the doorway of the bus the snowbank was plainly visible and as I sat on the bank of snow after the accident the condition of the streets was plainly visible. I know there is a sign up in front that says, 'Back Door Exit'. I have rode on it for 23 years."

Fritz Larson testified that he worked for the Sinclair Oil Company at its place of business on the north-east corner of North Fifth and State Streets and was working there at the time of the accident. He stated that at that time the streets were covered with ice and packed snow; that there was a space of about three feet between the sidewalk on the north side of East State Street and the curbing and in this area there was a snow bank about two feet high and this snowbank extended throughout East State Street. The bus stopped on the east side of Fifth Street and this witness testified that the sidewalk at that place was clear of snow and ice as were all the sidewalks; that the snowbank where appellee fell while alighting from the bus was located in this three foot area between the curbing and sidewalk; that the street at this point was rutty from ^{grooves} ~~grooves~~ made by traffic and the alternating freezing and thawing temperatures; that it had been a cold winter and the snow had been there for weeks and that all around the place where the bus stopped it was icy and had been for weeks.

Edmund Pearce testified that he was a patrolman with the Rockford Police Department and in response to a call went to the scene of the accident the evening of the accident and assisted in putting appellee in the ambulance and observed the bus and the snowbank. He stated that there was a large quantity of snow piled up from the corner which was about one foot or a foot and a half high; that the street between the bus and pile of snow was icy; that it was thawing and freezing but the sidewalk was clear. Aside from the medical testimony of Dr. Paul E. Dee the plaintiff offered no other evidence and no evidence was offered on behalf of the defendant.

Counsel for appellee, in order to sustain the judgment of the trial court, insists that it was the duty of appellant to use the highest degree of care, skill and diligence for the safety of appellee consistent with the character and mode of conveyance employed and the practical operation of its bus, that under the circumstances the driver of the bus should have warned appellee of the dangerous condition of the alighting place or should have invited appellee to alight through the front door and that in failing to take any action for the safety of appellee when she arrived at her destination appellant was negligent. In support of this contention counsel cite and rely upon two cases, Van Hoorbecke v. Iowa Illinois Gas and Electric Co., 324 Ill. App. 88 and O'Shea v. Chicago Motor Coach Co., 328 Ill. App. 457.

In the Van Hoorbecke case, 324 Ill. App. 88 supra, it appeared that upon the occasion in question the plaintiff was making a transfer from one bus to another and while she was walking toward the second bus which she intended to board, she slipped on an icy sidewalk and was injured. The evidence disclosed that the driver of the bus sounded his horn and motioned for the plaintiff to enter at the place where he had stopped some distance from the usual stopping place. Plaintiff, in obedience to the invitation to enter started to walk across the icy surface and slipped, sustaining the injury for which she sought a recovery. In the O'Shea case, 328 Ill. App. 457, supra, it appeared that the bus from which the plaintiff alighted had proceeded past the usual stopping place for discharging passengers; that it was dark where the plaintiff alighted but was light at the usual stopping place; that in stepping from the bus plaintiff stepped into a crevice or crack in the street,

which was one and a half or two inches wide and at least an inch deep, of which she had no knowledge and she fell and sustained an injury. In each of these cases, relied upon by appellee, the factual situations were entirely different than the situation disclosed by this record. In the instant case appellee testified that she was familiar with conditions as to snow and ice which prevailed generally over the city upon the night of this accident and in particular she was familiar with the condition of the street where the bus stopped and where she desired to alight. She testified that she had travelled on this bus line for 23 years, knew that the exit was at the rear and that when the bus stopped, in obedience to her signal, it did so at its regular and accustomed place; that she was the only passenger in the bus; that the driver said nothing to her and she said nothing to him; that when the door of the bus opened to permit her to alight she looked down and saw the ice and snowbank; that she continued to look down while she stepped off the bus and when her left foot came in contact with the ice which covered the surface her foot slipped and she fell on her ankle. The accident occurred when appellee was stepping down from the bus. It occurred before she had an opportunity of taking a single step away from the bus. The snowbank had nothing to do with the accident. Any warning that might have been given to her would not have added anything to her knowledge. She knew that she was stepping upon a surface covered with ice. She saw it, she stepped where she intended to step but her foot slipped and she fell and was injured.

Feeney v. Chicago City Ry, Co, 220 Ill. App. 400 was an action brought to recover damages for injuries sustained by the plaintiff when she alighted from defendant's street car. It appeared that directly underneath the step of the car where it stopped at the corner of State and Adams Streets in Chicago

the pavement had been torn up from the center of the street to the curb and the surface was rough and uneven. The plaintiff testified that after the car came to a stop she stepped off the car platform to the ground, a distance of a little more than two feet, with her right foot; that she looked where she was going and could see the ground right in front of the step; that her right ankle turned and she fell. In reversing a judgment for the plaintiff with a finding that the defendant was not guilty of any negligence the court said: "The general rule that a carrier of passengers has cast upon it a duty to furnish a safe place for the passengers to alight has only a qualified application to street railway companies operating on the surface of public streets, which they do not control. This qualification obtains because of the nature of the business which such street railways transact, and this distinction is recognized by the text writers and the courts." The court then quoted from Booth on Street Railways (2nd Ed.) sec. 326 and also from Thompson on Negligence, sec. 2712, and from Whitmore v. Detroit United Ry., 185 Mich. 46, 151 N.W. 651, all to the effect that a public street over which the street Railway Company has no control, is in no sense a passenger station for the safety of which the company is responsible and that if the street, at the place of discharging passengers presents a dangerous condition to one alighting there and such danger is obvious to the passenger, the carrier is not liable to him for injuries received. The court then concluded: "We can see no theory upon which defendants can be held guilty of negligence, and if any such theory were adopted,

it would, at the same time, require us to hold that plaintiff was guilty of contributory negligence. The accident was unfortunate but we think without negligence on the part of the defendants."

In the instant case the complaint alleged that plaintiff was not aware or conscious of the condition of the street beneath the door of the bus and between the door and curb and charged that as a direct result of the negligence of the defendant in stopping the rear exit door of the bus at the place it did stop, plaintiff stepped onto the icy surface and upon and against a pile of snow and ice with her left foot and her left foot slipped and doubled beneath her causing her to fall. It is not charged or suggested that defendant had any control of the street at the place where this accident happened nor that defendant had any part in creating the condition which there obtained. The evidence is that when the bus in which appellee was a passenger reached its regular stopping point where appellee had signified her desire to alight she was aware of the condition of the street and was looking down as she stepped from the platform of the bus. Appellant's duty was to discharge passengers under then prevailing conditions. While it is true that a carrier of passengers is required to exercise the highest degree of care consistent with the mode of conveyance adopted and the practical operation of its business, it is not an insurer and the law does not impose upon a carrier an unreasonable or impractical vigilance.

In our opinion the evidence in this record does not sustain the finding of the jury that appellant was guilty of negligence and therefore ^{the} judgment cannot be permitted to stand.

Judgment reversed.

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Agenda No. 14

84-11 LA 557

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Appeal from the
Circuit Court of
DuPage County.

The record in this cause discloses that John Schuck and Mary Schuck were married on May 20, 1909, and thereafter, on December 27, 1946, were divorced. After their marriage and prior to their divorce, they acquired title as joint tenants to the real estate involved in this proceeding. On July 26, 1948, the probate court of DuPage County appointed William Spinner Conservator of the person and of the estate of said John Schuck, and on October 4, 1948, John Schuck, by his Conservator, filed his verified complaint for partition in the circuit court of DuPage County alleging that the real estate described in the complaint was the only real estate owned in common by the parties

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and prayed for a partition thereof. In addition to making the former wife of his ward, Mary Schuck, a party defendant, the complaint also made Kenneth C. Richards, the tenant in possession of the premises, a defendant, alleging that he occupied the premises as a month-to-month tenant.

Mary Schuck filed a verified answer by which she admitted all the allegations of the complaint and averred that ever since the property was acquired by the parties, John Schuck caused the premises to be rented and collected the rents therefrom and has refused to state an account and prayed for an order requiring him or his conservator to do so. The tenant, Richards, was defaulted. On February 18, 1949, a decree for partition was rendered which found, from the pleadings, among other things, that the allegations of the complaint are true; that John Schuck and Mary Schuck were the owners in fee simple as joint tenants of the described real estate and that partition should be decreed as prayed. The decree is in the usual form and appointed commissioners, directing them to assign to John Schuck and to Mary Schuck, each the one-half thereof, and in the event the commissioners found that the premises cannot be divided, then to appraise the same. The decree referred the cause to a special Master for the purpose of stating an account. Following the report of ^{the} commissioners, a decree of sale was rendered on April 22, 1949. This decree approved the report of commissioners and found that a partition of the premises could not be made without manifest prejudice to the parties interested and ordered a sale directing that the proceeds of the sale be divided among the parties according to their respective rights and interests as found by the decree of partition and directed the special Master to execute the decree.

On June 3, 1949, the sale, as directed by the decree, was had, and Lewis Schuck became the purchaser of the premises for \$3200.00, of which amount he paid \$500.00 and the balance was to be paid upon the approval of the report of sale by the court. On December 23, 1949, the special Master filed his report so stating. On December 25, 1949, John Schuck died intestate, and on February 17th, 1950, Mary Schuck, by leave of court, filed her supplemental counterclaim reciting the foregoing facts and making the conservator, administratrix, and heirs at law of John Schuck counter-defendants. The counterclaim prayed that the special Master's report of sale be disapproved, the sale set aside, and counterclaimant be decreed to be the sole owner of said premises as surviving joint tenant. Replies to the supplemental counterclaim were filed by the counter-defendants averring that the decrees of partition and sale constituted a severance of the joint tenancy and insisting that by the death of John Schuck intestate, his heirs at law became the owners of his undivided one-half interest in said premises. William Spinner, as conservator of the original plaintiff, filed a petition for the allowance of attorney fees.

Upon a hearing the chancellor, on November 30, 1951, rendered a decree disapproving the special Master's report of sale, ordering the special Master to return to Lewis Schuck, the purchaser at the sale, the \$500.00 which he had paid, granted the prayer of the supplemental counter-claim, declared Mary Schuck the owner of the premises as surviving ^{joint} tenant, dismissed the original complaint, and denied the petition for attorney fees. To reverse this decree, William Spinner, the conservator of the person and estate of John Schuck, deceased, and the administratrix

of his estate, Hazel Schuck, and Hazel Schuck, individually, as one of the heirs at law of John Schuck, deceased, prosecute an appeal to this court.

Appellee, Mary Schuck, has filed her brief and argument and also a motion to dismiss the appeal on the ground that a freehold is involved and that this court does not have jurisdiction to entertain the appeal. Appellants have filed their printed reply brief and also a suggestion that if this court finds that it does not have jurisdiction of this appeal that then an order should be entered transferring this case to the Supreme Court.

"We think it clear every partition suit necessarily involves a freehold. In addition to the fact that the parties are bound to set forth and prove their titles and respective interests, each co-tenant, upon a partition being effected, loses his title and interest in every part of the land divided except the parcel assigned to himself, and as to that he becomes the sole and exclusive owner. Of course in this process, by which one of the co-tenants acquires an exclusive interest in a specific part of the partitioned premises, the others must necessarily lose what he gains. If, on the other hand, the land itself can not be partitioned, and a sale is ordered, in that event all the co-tenants will necessarily lose their estate or title in the subject of partition, but will receive, as an equivalent for it, its value in money. Thus it will be seen, every partition suit, whatever may be the state of the title, provided the subject of partition is a freehold estate, will necessarily involve a freehold." (Bangs v. Brown, 110 Ill. 96,98.) A freehold estate is involved in a partition suit where the subject matter of the suit is a freehold estate, whether the title is held in joint

tenancy or tenancy in common. (Hardin v. Wolfe, 318 Ill. 48,53).

"If an appeal in a partition suit involves only questions of accounting, liens upon shares of tenants in common, solicitor fees, or other questions not involving a freehold, the appeal should be taken to the Appellate Court, (Dicus v. Fuchs, 303 Ill. 489; Hutchinson v. Spoehr, 221 id. 312;) but where the title of some of the parties is challenged or an assignment of error questions the right to partition, the appeal should be taken directly to this court." (citing cases.) (Hasterlik v. Hasterlik, 316 Ill. 72-73.)

"It is established that this court has exclusive jurisdiction in the review of partition cases involving real estate." (citing cases.) (Ashton v. Macqueen, 361 Ill. 132,140.)

It is true that where an appeal involves only questions of an accounting, or liens or solicitor fees or parties or other questions not involving a freehold, the Appellate Court has jurisdiction (McCarthy v. McCarthy, 282 Ill. 498), but where the title of some of the parties is challenged or an assignment of error questions the right to partition, the appeal should be taken directly to the Supreme Court (Hasterlik v. Hasterlik, 316 Ill.

72,73). The appeal in this case involves the ownership of a freehold ^{and this court has no jurisdiction of this appeal. (Resistor v. Spahr, 304 Ill. 42)} The fact that the chancellor, by his decree, denied a partition and confirmed the title to the premises described in the complaint in one defendant is a final appealable decree, and in such a case a freehold is involved and an appeal lies to the Supreme Court. (Ames v. Ames, 148 Ill. 321,334, 335.)

Section 86 of the Civil Practice Act provides that where an appeal is taken to this court and it is found that the case was wrongly so appealed, it shall be the duty of the court to direct the clerk to transmit the transcript and all files with the order of transfer to the Clerk of the Supreme Court (Ill. Rev. St., Chap 110, Par. 210, sec. 86). The motion of appellee to dismiss the appeal is therefore denied, and this cause is ordered transferred to the Supreme Court.

Cause transferred.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FEBRUARY TERM, A. D. 1952

R. L. POLK & COMPANY, a corporation,
Plaintiff-Appellee,
vs.
CARL E. STRICKLER,
Defendant-Appellant.)

Appeal from

Circuit Court of

Lake County, Illinois

ANDERSON -- J.

R. L. Polk & Company, plaintiff-appellee, filed its suit against Carl E. Strickler, defendant-appellant, in the Circuit Court of Lake County, Illinois. The complaint alleged in substance that on January 23, 1950 the defendant executed and delivered to the plaintiff his promissory note for \$3964.42, payable at the rate of \$500.00 per month, and asked judgment for the balance due on the note. The defendant filed an answer and admitted the execution of the note, but denied that any money was due the plaintiff. He also filed three special defenses to the complaint, the first stating that certain payments had been made on the note; the second alleging that, after certain sums had been paid on the invoice for the merchandise received by the defendant, the note was given for the balance therefore, but that balance was incorrect as the plaintiff had agreed to print the circulars at a smaller rate per thousand than that charged in the invoice and included in the note, and therefore there was no consideration for the increased charge; the third and fourth special defenses alleged that the plaintiff had breached express and implied warranties

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made by it -- that it maintained that the mailing list that it sold the defendant in September, 1949 was fresh and up to date, when in fact it was not.

Defendant also filed three counterclaims, the first two alleging that the defendant had been damaged in the sum of \$12,500.00 by reason of the breach of the warranties above mentioned. The third counterclaim alleged that the plaintiff customarily paid and agreed to pay users of its mailing list postage on such mail which was undelivered, that at plaintiff's request the defendant returned as undelivered 4031 of the 99,082 circulars mailed, and that amount due the defendant thereon was \$120.93.

After the beginning of the trial before the court without a jury on August 14, 1950, the defendant objected to certain testimony because no reply had been filed to the answer and the counterclaims in accordance with Supreme Court Rule 8, Ill. Rev. Stat., 1951, Ch. 110, Par. 259.3 (3).

The plaintiff's attorney admitted in open court that he had not complied with the rule, having overlooked filing the replies, and asked leave of court to file proper replies thereto, instanter. Counsel for plaintiff then stated that the replies would consist of general denials. Defendant's counsel admitted he would not be taken by surprise by the contents of the replies and the court permitted the replies to be filed, overruled defendant's motion for judgments on the counterclaims, and directed that the trial proceed.

After hearing the evidence, the court found that there was an account stated between the parties, and entered judgment in favor of the plaintiff for \$3575.00, the balance due on the note, and found the issues for the plaintiff and against the defendant on the counterclaims which he dismissed. This appeal follows.

The defendant assigns error on the ruling of the court permitting the replies to be filed to the defendant's answer and counterclaim during the trial. We shall first dispose of this alleged error. The question presented is whether or not the court abused its sound judicial discretion in permitting the filing

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of the replies. Supreme Court Rule 3 above mentioned fixes the time for the filing of the reply and plaintiff admitted that the time for filing of the replies had lapsed prior to the date of the trial. The Civil Practice Act provides, Ill. Rev. Stat., 1951, chap. 110, 170-46, in substance that at any time before final judgment the pleadings of the parties may be amended under such terms as are just and reasonable. This provision should be read in conjunction with Supreme Court Rule 3. It appears to us that although Rule 3 does fix the time for filing the subsequent pleadings, the provisions of the Civil Practice Act above mentioned permit the court to allow subsequent pleadings to be filed when it is just and reasonable. Here there was no good reason not to permit the filing of the replies. No new issues were presented by the replies, defendant was not taken by surprise, and it was within the sound judicial discretion of the court to permit the filing of the same. This rule seems to be well settled in this state by decisions under the former Practice Act. (Strawn Farmers' Elevator Co. vs. Bennett & Co., 168 Ill. App. 428; McCoy vs. Columbian Exposition, 186 Ill. 356.) The statute permits this, and no precedent is needed. It was permitted however under the present Practice Act in Smothers vs. Koch, 339 Ill. App. 512. The court there held that it was not an abuse of the judge's discretion to permit the defendant to amend an answer in order to plead accord and satisfaction after both sides had rested their case.

Under the law the trial judge did not abuse his sound judicial discretion in permitting the replies to be filed, and appellant's contention on this question is not tenable.

The undisputed facts in this case disclose that in September, 1949, defendant ordered a mailing list of approximately a hundred thousand names from the plaintiff. The list was to be used by the defendant for direct mail advertising. The plaintiff prepared a circular for the defendant, and mailed out the advertising. Prior to the placing of the order, defendant had conferred with the plaintiff's Chicago sales manager concerning the order. The list was to contain

the names of various business firms including those beginning business after the war. It was tentatively agreed that the price was to be \$16.80 per thousand. Later by agreement of the parties the price per thousand was raised to \$22.80. Invoices for the work after completion were submitted to the defendant at the higher rate, to which he made no objection. Defendant paid some money on account on the invoices when presented about two months or more after the work had been completed. On January 23, 1950, defendant gave plaintiff a note for the balance due, \$3964.42, payable as above mentioned in the complaint.

From February 28, 1950, to June 20, 1950, defendant made various payments on the note which reduced the amount due thereon, as of June 20, 1950, to \$3575.00. From the date of the note to December, 1950, the defendant wrote the plaintiff five letters in reply to requests for payment in which defendant stated in substance that he owed the balance due and would pay it. In these letters he made no complaint about the services performed by the plaintiff, but stated he was in financial difficulty, and as soon as he had sold a farm that he would liquidate the note. In fact the undisputed evidence discloses that defendant made no claim that he did not fully owe the debt until after the filing of the present suit.

Plaintiff contends that the giving of the note constituted an account stated between the parties, and that defendant cannot now contend, either under his special defenses or by his counterclaim that he is not liable for the balance due on the note. In *The State vs. Ill. Central R. R. Co.*, 246 Ill. 133, the Supreme Court announces the law with reference to accounts stated, and says:

"A stated account is an acknowledgment of an existing condition of liability of the parties, from which the law implies a promise to pay the balance thus acknowledged to be due. The terms 'stated' and 'settled' accounts are sometimes used as equivalent expressions. (1 Cyc. 364, and cases cited; 1 Words and Phrases, p. 93; 1 Ency. of L. & P. 728, and cases cited; *Chicago, Milwaukee and St. Paul Railway Co. vs. Clark*, 92 Fed. Rep. 968; *McDow vs. Brown*, 2 S. C. 95.) *** 'A person seeking to open a settled account must specify in his claim either errors of considerable extent, both in number and amount, or at least one important error of a fraudulent nature.' (1 Daniell's Ch. Pl. & Pr. 371. *** Fraud or imposition not being shown but only errors and omissions, corrections will be

confined to those errors, the burdens of proof resting upon the party complaining, to establish them. (Paulling vs. Creagh's Admr., 54 Ala. 646; Williams vs. Savage Manf. Co., 1 Md. Ch. 306; Perkins vs. Hart, 11 Wheat. 237.) *** The general rule, however, that in order to open a stated account the bill must either charge fraud specifically or point out the particular errors, applies whether the parties have been dealing at arm's length or occupy confidential relations, and the authorities seem to be a unit in holding that mistakes or errors must be specifically alleged and proved." (Citing many cases.)

For further authority on this question, in harmony with the Supreme Court's opinion, see Gottfried Brewing Co. vs. Szarkowski, 79 Ill. App. 583; Dean & Son vs. W. B. Conkey Co., 130 Ill. App. 162; Goddard Tool Co. vs. Crown Electrical Mfg. Co., 219 Ill. App. 34.

Applying the above legal principles to the facts here, it appears from the undisputed testimony that in effect the parties met and stated their account by giving the note. The subsequent letters admitting the liability corroborated this. The fact that there had been some dispute about the amount to be charged for the services prior to the execution of the note is now of no avail to the defendant, as he agreed by giving the note that this matter had been settled. For the same reasons the special defenses set up by the defendant avail him nothing.

Defendant contends that the breach of warranties as alleged by him in his counterclaims should permit recovery on them. The questions of breach of warranty as a defense to the note are not available against the account stated. Since the counterclaims arose out of the original transaction, neither are the questions of breach of warranty in the counterclaims available against the account stated. There is no evidence of fraud or mistake in the record. All of the defenses and counterclaims alleged were merged in the agreement of the parties when they stated their account. The trial court was correct in entering judgment on the balance due on the note and in dismissing the counterclaims.

Assuming but not admitting that the defendant had a cause of action on his counterclaims, it appears to us that he failed by competent evidence to prove any damages on them. This burden of proof was upon him under the counter-

continued to these women, the object of their mission was to
convert them to Christianity. In 1840, the first mission was
sent to the Sandwich Islands, and in 1841, the second mission
was sent to the same islands. The first mission was led by
William Hall, and the second mission was led by John Williams.
The first mission was successful, and many of the natives
were converted to Christianity. The second mission was also
successful, and many of the natives were converted to Christianity.

The first mission was led by William Hall, and the second mission
was led by John Williams. The first mission was successful, and
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was led by John Williams. The first mission was successful, and
many of the natives were converted to Christianity. The second
mission was also successful, and many of the natives were converted
to Christianity.

claims. It appears from the testimony of the defendant that his damages arose largely from the fact that he did not obtain as much profit from the mailing of this list as he anticipated, and as heretofore obtained from similar mailings. He attributed this to the fact that the lists were not up to date. It appears to us that his loss of profits, if any, is speculative, uncertain, and conjectural, and would not sustain any finding in his favor on the counterclaims. (Salaban vs. East St. L. & I. Water Co., 284 Ill. App. 358.)

Defendant further contended that the trial court was in error in not permitting him to show by telephone directories of various cities that the names of many merchants in business at the time the list was furnished by the plaintiff were omitted from the list. We doubt very much whether this proof was proper, but in view of our findings that the defendant had established no damages and was not liable because of the account stated, it is not necessary to pass upon this question here.

After carefully examining the record and the errors assigned, we conclude that there was an account stated between the parties, and that the plaintiff was entitled to recover \$3575.00, the balance due on his note, and that this was fully established by the evidence. We further hold, as above indicated, that the defendant by reason of the account stated was precluded from recovering on his counterclaims. We further hold that even assuming that the account stated did not prevent recovery on the counterclaims, there was no proper proof of any damages on the same by the defendant.

The judgment of the trial court entering judgment in favor of the plaintiff and against the defendant, and dismissing the counterclaims, is in conformity with the law and the facts, and should be and is affirmed.

Judgment affirmed,

Gen. No. 10517.

Ag. No. 1.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FEBRUARY TERM, A. D. 1952

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| PEOPLE OF THE STATE OF ILLINOIS, |) | |
| Defendant in Error, |) | |
| vs. |) | Writ of Error to |
| |) | County Court |
| |) | McHenry County. |
| VICTOR PERRETT, alias VICTOR PERRY, |) | |
| Plaintiff in Error. |) | |

WOLFE - - J.

An Information was filed in the County Court of McHenry County charging Victor Perrett with Contributing to the Delinquency of a Minor Child and also with Disorderly Conduct. The case was tried before the Court without a jury, and at the conclusion of the People's evidence the first three counts were dismissed, leaving only the Disorderly count of the Information.

The fourth count charges "that the Defendant, Victor Perrett, did then and there unlawfully, wilfully and knowingly do and commit acts of open lewdness, disorderly conduct or other notorious acts of public indecency, that is to say: That the said Victor Perrett did then and there unlawfully, wilfully and knowingly exhibit his sexual organs and private parts to one Jacqueline Brady, and did then and there unlawfully, knowingly and wilfully entice, encourage and request that said Jacqueline Brady to touch his sexual organs or private parts with her hand

or hands, all of which thereby tended to debauch the public morals and make the said Victor Perrett guilty of Disorderly Conduct contrary to the Statutes, etc."

The case was tried before the Court without a jury, and he found the Defendant guilty and sentenced the Defendant to pay a fine of one hundred dollars and costs. To reverse this judgment the case is brought to this Court by writ of error.

On November 11th 1950, the date that the alleged offense was committed, Victor Perrett and his wife were having a children's party for their son who was about ten years of age. Jacqueline Brady was a guest at the party. Mr. Perrett had been directing the play of the children and on being informed by his wife that it was about five o'clock, that he should go to the bathroom and take a shower and clean up as they had a dinner engagement at seven o'clock, Mr. Perrett went to the bathroom, had a shower, then clothed himself in a bathrobe and was in the act of shaving when Jacqueline Brady knocked on the door of the bathroom and he opened the door to let her in and she hid in the shower room, playing the game of hide and seek. It was during this time that Jacqueline Brady claims that Mr. Perrett exposed his privates to her and asked her to touch his penis. Mr. Perrett admits that Jacqueline came into the bathroom to hide but denies that he intentionally exposed his privates to Jacqueline or that he in any way asked her to touch his privates. These were the only two witnesses that testified relative to what acts really occurred.

Dr. Max Nathaniel Silver testified that he was a regular practicing physician and that in October 1949 he had examined

Victor Perrett and also in March of 1950, and he said that the patient had given him a history of sexual impotency; that he had been in good health until he was wounded in Africa while serving in the British Army in 1944; that examination disclosed marked atrophy and partial absence of a penis; that no penis was visible to the eye in both standing up and lying down positions. This evidence was not disputed in any way.

Fifteen witnesses, neighbors, professional men, clergymen, and businessmen, were called and testified that they knew the general reputation of Victor Perrett for moral character, in the neighborhood in which he lived, and each testified that it was good. While evidence of a good reputation is not proof of innocence it is not to be disregarded, and it may be sufficient to raise a reasonable doubt as to the Defendant's guilt; and where proof of good reputation stands uncontroverted it must be accorded some consideration and weight. (The People versus Buchholz 363 Illinois 270, and People versus Pax 399 Illinois 605.)

In the case of People versus Pax supra the Defendant was charged with taking indecent liberties with a minor child. The proof rested with the evidence of the prosecuting witness and a denial by the Defendant. The Court in that case stated: "Where a conviction of taking indecent liberties depends upon the testimony of the prosecuting witness, a child of fourteen years of age, and the Defendant denies the charge, there must be substantial corroboration of the prosecuting witness by some other evidence, fact or circumstance in the case, and the conviction cannot be sustained where the evidence does not create

an abiding conviction of the guilt of the Defendant."

The case further states: "The crime charged is one similar except possibly in degree to the crime of rape. We said in *People versus Martin* 330 Illinois 323 'we have repeatedly held in rape cases that where a conviction in a rape case depends upon testimony of the prosecuting witness and the Defendant denies the charge there must be substantial corroboration of the prosecuting witness by some other evidence, facts or circumstances in the case' ".

From a review of the evidence in this case we are not convinced beyond a reasonable doubt of the guilt of the Defendant, and the judgment of the trial court is therefore reversed.

Judgment Reversed.

Abstract

Gen. No. 10601

Agenda No. 10.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
MAY TERM, A. D. 1952.

341A. 259

PETER CIESKUS,
Plaintiff-Appellee,

vs.

MARIE YUVAN and WOLVERINE
INSURANCE COMPANY, a Corpor-
ation,
Defendant-Appellant.

Appeal from the
Circuit Court of
Bureau County.

WOLFE,-- J.

Peter Cieskus filed a suit in the Circuit Court of Bureau County against Marie Yuvan and Wolverine Insurance Company alleging that while he was driving an automobile that belonged to Marie Yuvan and exercising ordinary care for his own safety, the car was overturned and he was injured and that Marie Yuvan had an insurance policy in the Wolverine Insurance Company insuring her against liability for any one injured in her car.

The insurance company filed an answer to the complaint, admitted having insurance for Marie Yuvan, but denied that they were obligated in any way to pay for the injuries of Peter Cieskus. They denied that the car belonged to Marie Yuvan,

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but alleged that it belonged to Peter Cieskus, also that the insurance policy had not been assigned from Marie Yuvan to Peter Cieskus. The case was tried before a jury that found the issues in favor of the plaintiff and assessed his damages at \$500.00. It is from this judgment that the appeal has been prosecuted to this Court.

There are numerous questions argued why the judgment should be reversed, but if the car did not belong to Marie Yuvan at the time that the accident happened, then the other questions are immaterial. The car originally belonged to Marie Yuvan. On Friday, April 5, 1946, Peter Cieskus learned that the car was for sale and went to the Yuvan home to look it over. Mrs. Yuvan was not at home on that date, but John Yuvan showed the car, and told Cieskus that it needed a little repair and they wanted to sell it for the sum of \$750.00. Cieskus came back the next day and John Yuvan told him to take it out and try it and see how it operated. Cieskus did take the car out, said he would take the car and he paid John Yuvan \$500.00 in cash and said he would pay him the balance on Monday. The daughter of Yuvan wrote out a receipt for \$500.00 and delivered it to Cieskus. Cieskus took the car and drove it to Princeton to get a driver's license. At that time he stated that he bought the car and it belonged to him.

Before the bargain was closed and after Cieskus stated that he was at the Yuvan home in the morning, the abstract of record shows the following: "I returned in the afternoon about one o'clock. I saw John, and I was there twice in the afternoon. I was there three times that day. I saw John at his home. I

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had a conversation with John and his daughter. I asked him if the car was in good running condition. He said it was. I said, what was the price on it, and he then gave me the price of \$750.00. I said "Isn't \$750.00 too high a price for a '37 Buick?" He said that he had done a lot of work on it and he figured it should be that high. What did you say then? All right, I will take the car. I hadn't tried the car out yet. I had been in the car but had not driven it. I had run the motor and started it up but I said I would take the car. Question-- That is, you accepted his offer of \$750.00 for the sale of the car? Answer-- Yes. Well, I said I would drive it around, then, after I made the agreement on the price, so I drove it around then. I said I would drive it around town and come up here to Princeton and apply for my driver's license. Question-- Did you, before that did you tell him you would take the car if it was all right when you tried it out? Answer-- Yes."

Cieskus after stating that he took the car and drove home to get \$500.00 in cash stated: "I drove this car down to John's. The car operated satisfactorily to me when I drove it down to John's. The reason I got the \$500.00 was because I was going to buy the car. I decided I wanted the car and it was satisfactory. When I drove up to John's I parked the car in front of the house. I told him I would give him \$500.00 as a down payment on the car. I told him as long as we were going to make arrangements for Monday, I would give him the other \$250.00 on Monday. I told him it was in good working condition and I would accept the car. Question-- You did

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accept the car, then, didn't you? Answer-- Yes." This evidence is further corroborated by John Yuvan who attended to the sale of the car for Mrs. Yuvan.

In the accident the car turned over and was demolished and then sold by Peter Cieskus' brother, Joe, for \$45.00 for junk. Peter Cieskus stated that his brother Joe was authorized to transact the business for the sale of the car. Peter Cieskus did not cash the check for the sale of the car, because he stated that his attorneys advised him not to cash it.

We are convinced the evidence as disclosed by this record clearly shows that a bargain and sale of this car was fully completed, and at the time of the accident the car belonged to Peter Cieskus.

It was incumbent on the plaintiff to prove by a preponderance of the evidence that at the time of the accident the car belonged to Marie Yuvan, as the insurance would be void if the car had been sold from her to the plaintiff. This, he failed to do and the judgment in his favor was contrary to the manifest weight of the evidence. The judgment appealed from is hereby reversed.

Judgment reversed.

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Gen. No. 10611

Agenda No. 13.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
MAY TERM, A. D. 1952.

| | | |
|------------------------------|---|---------------------|
| KENNETH W. ANDERSON, Et Al., |) | |
| Plaintiffs-Appellants, |) | |
| vs. |) | Appeal from Circuit |
| |) | Court Rock Island |
| |) | County. |
| EDWARD W. ERICKSON, Et Al., |) | |
| Defendants-Appellees. |) | |

WOLFE,-- J.

Edward W. Erickson and his wife owned a house and lot in the City of Moline, Illinois. They also owned a vacant lot in front of their property. Kenneth W. Anderson et al., started a suit in the Circuit Court of Rock Island County to restrain the Ericksons from dedicating this lot as a public street in the City of Moline, Illinois. The contention of the plaintiffs is that this lot is in a district that had been zoned as residential property. The home of the defendants is not in this district, and they use this vacant lot for ingress and egress from their residence, and also allow some people who live neighbors to them to use this vacant lot, as they use it. The suit was brought, as

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before stated, to restrain them from dedicating the lot as a public highway so that all people situated as the defendants were, could use it as a public highway. The plaintiffs procured a temporary injunction without notice and without bond.

The defendants moved to dissolve the temporary injunction and for leave to file a suggestion of damages. Upon a hearing the temporary injunction was dissolved and leave was granted to the defendants to file suggestion of damages. This was filed by defendants claiming attorney's fees in the sum of Four Hundred Dollars, for procuring the dissolution of the temporary injunction. The plaintiffs, now appellants filed a motion to strike, or in the alternative to dismiss the suggestion of damages. The Court proceeded to trial and received evidence from the defendants on their suggestion of damages.

At the conclusion of the evidence, the Court allowed the Ericksons the sum of Two Hundred and Fifty Dollars for attorney's fees, which they had obligated themselves to pay in the defense of the injunction suit. It is from this judgment that the appeal has been perfected to this Court.

It is first claimed that the Court erred in going to trial on the merits of the defendants-appellees' suggestion of damages before the plaintiffs-appellants had plead and joined issue thereon. The same objection was raised in the case of Slezak vs. Fleming, 392 Ill. 387, and the Court there stated: "So far as the first objection is concerned, the

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parties, by voluntarily and without objection offering evidence in the condition of the record, without demanding answers to the complaint or the cross complaint, waived any objection, if such they had, to such condition of the record." We think the above contention is without merit.

There is no question that the Ericksons were compelled to, and did employ attorneys to represent them in the injunction suit and that they were successful in getting the temporary injunction dissolved. These facts are prima facie proof that these solicitors were employed by the defendants, and it will be presumed they were properly employed until the contrary is shown. *Howard vs. Burke*, 248 Ill. 224.

It is argued strenuously that under the circumstances as shown in this case, the defendants are not entitled to any damage whatsoever, and not entitled to an allowance for attorney's fees. The same question was raised in *Sager vs. City of Silvis*, 402 Ill. 262, where we find this language: "It is argued that the court erred in allowing attorney's fees to appellee in having the injunction dissolved. The objection is not to the reasonableness of the fee but it is said that the dissolution of the injunction was merely incidental to the main defense of the suit. We do not share that view with appellants. The license fee could not be collected so long as the injunction remained effective. Questions of equitable jurisdiction and the right to issue the injunction were involved. In our opinion there was no abuse of the court's discretion in allowing this fee."

The trial court properly allowed the attorney's fees. The judgment appealed from will therefore be affirmed.

Judgment affirmed.

347 ILL. APP.

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STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

October Term, A. D. 1951.

General No. 9765

Agenda No. 4.

LESTER E. THOMAS, et al.,
Plaintiffs-Appellants,

vs.

VILLAGE OF SOUTHERN VIEW,
ILLINOIS, AND JAMES R. COX,
PRESIDENT OF THE BOARD OF
TRUSTEES OF SAID VILLAGE,
et al.,
Defendants-Appellees.

Appeal from the Circuit
Court of Sangamon County.

347 ILL. APP. 369¹

Reynolds, J.

The plaintiff, Lester E. Thomas and eleven other property owners of the Village of Southern View, Illinois, brought suit against the Village of Southern View, Sangamon County, Illinois, a municipal corporation, the municipal officers and Everett J. Tostberg and Dorothy M. Tostberg, the owners of certain lots in the Village of Southern View, to enjoin the enforcement of a certain zoning ordinance adopted by said village in 1948 and to enjoin the use of the premises owned by the Tostbergs for any commercial use or purpose and to have the said ordinance declared invalid.

The defendants-appellees, Everett J. Tostberg and Dorothy M. Tostberg, filed a motion for judgment on the pleadings.

The court, without hearing any evidence allowed defendants' Tostbergs' motion for judgment on the pleadings. The decree found that by the pleadings it was admitted that the defendants Tostberg were operating a garage and an extract manufacturing company, both of which were commercial and would be in violation of the 1947 ordinance if the plaintiffs' contention that the 1948 village ordinance zoning Tostbergs' property commercial was invalid, was correct;

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that by the pleadings it was admitted that the Village of Southern View passed an ordinance on April 4, 1950, repealing all prior zoning ordinances as it affected the property of defendants Tostberg; that the April 4, 1950 zoning ordinances classified all of the village as residential; that the April 4, 1950 ordinance supersedes and repeals all prior zoning ordinances and authorizes the defendants Tostberg to utilize the property for the present commercial businesses now operating thereon which were operating as such at the time of the passage of the April 4, 1950 ordinance; that the 1950 zoning ordinance is the only ordinance covering zoning in the village of Southern View; that since the use of defendants Tostbergs' property is in accordance with the now existing zoning ordinances, the equities do not lie in favor of the plaintiffs and no injunction could issue.

The plaintiffs appealed from this decree and thereafter, on February 1, 1951, Noll, Traynor & Hendrix, attorneys for Everett J. Tostberg and Dorothy M. Tostberg, filed a motion for leave to withdraw with the consent of the said defendants attached thereto, as attorneys for said defendants in this court. An order granting leave to withdraw, to such attorneys was entered on February 6, 1951.

On March 6, 1951, the defendant, the Village of Southern View, Illinois, a municipal corporation and all the municipal officers, by their attorney, filed in this court a confession of errors. They confessed error on each point relied upon by the plaintiffs-appellants and prayed that the judgment rendered in the circuit court be reversed and cause remanded with instructions to enter a decree for the plaintiffs-appellants therein.

Under the present state of the record in this court, the decree entered by the Circuit Court is vacated and the cause is remanded for the parties to take whatever action they deem appropriate in the circuit court.

Reversed and remanded with directions.

~~Not to be published in full.~~

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

Abstract

May
~~February~~ Term, A. D. 1952.

General No. 9765

Agenda No. 11.

LESTER E. THOMAS, et al.,
Plaintiffs-Appellants,

vs.

VILLAGE OF SOUTHERN VIEW,
ILLINOIS, and JAMES R. COX,
President of the Board of
Trustees of said Village,
et al.
Defendants-Appellees.

Appeal from the
Circuit Court of
Sangamon County.

REYNOLDS, J.

The plaintiff, Lester E. Thomas and eleven other property owners of the Village of Southern View, Illinois, brought suit against the Village of Southern View, Sangamon County, Illinois, a municipal corporation, the municipal officers and Everett J. Tostberg and Dorothy M. Tostberg, the owners of certain lots in the Village of Southern View, to enjoin the enforcement of a certain zoning ordinance adopted by said village in 1948 and to enjoin the use of the premises owned by the Tostbergs for any commercial use or purpose and to have the said ordinance declared invalid.

In the complaint it was alleged in substance that the Village of Southern View by an ordinance adopted June 3, 1947 had zoned the entire area in said village as residential; that on or about November 1, 1948 the board of trustees of said village had attempted to rezone the property owned by the defendants-appellees Everett J. Tostberg and Dorothy M. Tostberg from residential to commercial and that the action of the board of trustees in so attempting to rezone the Tostberg property was void. Plaintiffs, being the owners of property adjoining that of the Tostbergs, sought to enjoin the enforcement of the November 1, 1948 ordinance, to enjoin the use by the Tostbergs of their property for any commercial use or purpose and to have the November 1, 1948 ordinance declared invalid.

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The Tostbergs, defendants-appellees, filed an answer containing four counts and the plaintiffs replied thereto, denying the matters alleged in counts two, three and four of the answer.

On July 24, 1950 defendants-appellees Everett J. Tostberg and Dorothy M. Tostberg filed their supplemental answer in which it was alleged that on April 4, 1950 the Village of Southern View, Illinois duly made and passed an ordinance which repealed all prior zoning ordinances; that at the time of the passage of the ordinance of April 4, 1950 they were operating on their property a garage and an extract manufacturing company and that Section IV of said ordinance made it lawful for them to continue to use their property as a non-conforming use. Plaintiff's reply to the supplemental answer admitted the passage of the ordinance of April 4, 1950 but denied the other allegations contained in the supplemental answer.

On the basis of the matters alleged in the supplemental answer and the reply thereto defendants-appellees, Everett J. Tostberg and Dorothy M. Tostberg filed a motion for judgment on the pleadings.

The court, without hearing any evidence allowed defendants' Tostbergs' motion for judgment on the pleadings. The decree found that by the pleadings it was admitted that the defendants Tostberg were operating a garage and an extract manufacturing company, both of which were commercial and would be in violation of the 1947 ordinance if the plaintiffs' contention that the 1948 village ordinance zoning Tostbergs' property commercial was invalid, was correct; that by the pleadings it was admitted that the Village of Southern View passed an ordinance on April 4, 1950, repealing all prior zoning ordinances as it affected the property of defendants Tostberg; that the April 4, 1950 zoning ordinances classified all of the village as residential; that the April 4, 1950 ordinance superseded and repealed all prior zoning ordinances and authorized the defendants Tostberg to utilize the property for the present commercial businesses now operating thereon which were operating

as such at the time of the passage of the April 4, 1950 ordinance; that the 1950 zoning ordinance was the only ordinance covering zoning in the village of Southern View; that since the use of defendants Tostbergs' property is in accordance with the then existing zoning ordinances, the equities did not lie in favor of the plaintiffs and no injunction could issue.

This cause comes to this court on appeal from the decree of the Circuit Court of Sangamon County.

On March 6, 1951, the defendants-appellees, the Village of Southern View, Illinois, a municipal corporation and all the municipal officers, by their attorney, filed in this court a confession of errors. They confessed error on each point relied upon by the plaintiffs-appellants and prayed that the judgment rendered in the circuit court be reversed and cause remanded with instructions to enter a decree for the plaintiffs-appellants therein.

The Tostbergs, defendants-appellees, defend the decree of the Circuit Court in this Court.

The plaintiffs-appellants contend that the court erred in allowing the motion for judgment on the pleadings, on the theory that such motion should not be allowed where there is a material issue of fact or law in dispute. It is the theory of the defendants-appellees that the supplemental answer, setting up the passage of the April 4, 1950 ordinance which provided among other things, in Section 4 thereof as follows: "The lawful use of buildings, structures and land, existing at the time of the passage of this ordinance, although such use does not conform with the provisions hereof, may be continued," The principal argument of the plaintiffs-appellants is to the effect that the defendants-appellees were not conducting a lawful non-conforming business on their property at the time of the passage of the ordinance in April, 1950. They contend that such operation was in violation of the 1947 zoning ordinance and therefore was not lawful at the time of the

passage of the subsequent ordinance. The April 4th ordinance purported to cover the entire subject of zoning in the Village of Southern View. Section 13 of said ordinance reads as follows: "Repeal. All ordinances or parts of ordinances in conflict herewith are hereby repealed".

It seems to this court that the trial judge had before him the question of the effect of the passage of the 1950 zoning ordinance and that such question was purely a matter of law. It is elementary that cities and villages have authority to pass zoning ordinances and that right is not questioned in this case. It is admitted by the pleadings that the defendants were using their property for commercial purposes on the date of the passage of the last ordinance. There is no question but what the operation of a garage and an extract manufacturing business are lawful businesses within themselves. The passage of the 1950 ordinance, repealing all other ordinances and excepting lawfully operated non-conforming uses at the time of its passage, excepted the property of the defendants-appellees from the residential district as non-conforming users.

The decree of the Circuit Court was correct and should be affirmed.

affirmed.

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Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

May Term, A.D. 1952

General No.9797

Agenda No.1

FIRST MUTUAL SAVINGS ASSOCIATION,
Plaintiff,

vs.

BENJAMIN O. COOPER, Auditor of Public
Accounts of the State of Illinois,et al.,
Defendants.

IRVING J. LEWIS et al.,
Movants-Appellants.

vs.

FIRST MUTUAL SAVINGS ASSOCIATION,
Plaintiff-Appellee,
and

BENJAMIN O. COOPER, Auditor of Public
Accounts of the State of Illinois,et al.,
Defendants-Appellees.

REYNOLDS, J.

Appeal from the
Circuit Court of
Sangamon County.

347 I.A. 570

On December 14, 1950, the Circuit Court of Sangamon County, by its order denied the verified motion, as amended, of Irving J. Lewis, Albert A. Lewis, as Trustee for Sandra Lewis and Susan Lewis, The Trust Company of Chicago, Chicago, Illinois, a corporation, as trustee under Trust No.5044, David D. Ross and Ann R. Ross, for leave to intervene in and to be brought in, made and added as parties plaintiff in the cause of the First Mutual Savings Association, a corporation, plaintiff vs. Benjamin O.Cooper,Auditor of Public Accounts of the State of Illinois, and James T. Sweeney, appointee and representative of said Auditor of Public Accounts, defendants, General No. 95604, in Chancery of said Circuit Court of Sangamon County, to prosecute and maintain the same for and on behalf of the said First Mutual Savings Association, and for other relief. From the order of the Circuit Court, denying the motion to intervene and for other relief, the movants-appellants appeal to this court.

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State of Illinois
Department of State
January 1, 1907

Very truly yours,
J. B. Linn

Attorney General

January 1, 1907

STATE DEPARTMENT, WASHINGTON
January 1, 1907

Very truly yours,
J. B. Linn

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Department of State
Washington, D. C.

January 1, 1907

Very truly yours,
J. B. Linn
Attorney General

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Very truly yours,
J. B. Linn
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Very truly yours,
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J. B. Linn
Attorney General

The first Mutual Savings Association is a building and loan association at Chicago, Illinois. It appears that it was organized under the general law relating to building and loan associations, and was operating under that general law when this cause of action arose. On April 1, 1949, the Auditor of Public Accounts for the State of Illinois took possession of the books, records and assets of the said association, and served the notices required by Statute for such taking of possession. On April 8, 1949, the plaintiff association, within the ten days allowed by statute, filed its suit for an order to show cause why an injunction should not be issued against the said Auditor, restraining him, his agents, appointees and servants from withholding possession and control of the books, records and assets of the plaintiff association, and restraining the Auditor and his agents and appointees from further proceedings, and for an order of such equitable relief as the Court found proper. The court allowed the order prayed for and set the 2nd day of May, 1949 for the Auditor to show cause. This time limit was extended by agreement and otherwise until September 27, 1949. On September 27, 1949, by stipulation of the parties, it was agreed that the order for the rule to show cause be vacated and set aside, that the Auditor should not appoint a receiver for the plaintiff association without ten days notice upon the association and that the cause be continued generally, subject to activation upon due notice by either party. The Auditor continued to hold the possession of the books, records and assets of the plaintiff association. On August 4, 1950, the Auditor called a special meeting of the plaintiff association for the purpose of re-organization. On September 5, 1950, the plaintiff association filed a supplement to its complaint and prayed that the Auditor be restrained from proceeding with the reorganization and specifically that the Auditor be restrained from obtaining proxies from the shareholders. On September 5, 1950, the Auditor filed his motion to dismiss and on September 7, 1950, a motion to quash all summonses. On September 7, 1950, the motions to dismiss and to

quash were denied. The plaintiff association then withdrew its motion for the restraining order. On September 8, 1950, the Auditor filed his answer to the complaint and supplement. On September 9, 1950, the Auditor filed a motion for injunction to restrain the plaintiff association from filing or prosecuting any proceeding to obtain an adjudication concerning the exercise of jurisdiction by the Auditor over the plaintiff association, or restraining or interfering with the auditor concerning the shareholders' meeting or the solicitation and voting of proxies. The injunction prayed by the Auditor was entered on September 9, 1950. On September 12, 1950, the plaintiff association filed a motion for dissolution of the injunction of September 9, 1950. This motion was denied. On September 15, 1950, the court by an order held that the Auditor had no legal power, express or implied, to solicit proxies on behalf of himself, for any proposed reorganization of the plaintiff association, and that the voting of such proxies would be against public policy, and if done, invalid and void. On September 22nd, 1950, the plaintiff association filed its motion to dissolve in its entirety the injunction of September 9, 1950, and for an order requiring the auditor to produce certain documents and to permit the plaintiff association to have access to books and records for the purpose of hearing on the issues. On September 29, 1950, the court denied the motion to dissolve the injunction in its entirety, but ordered the defendant Auditor to permit the plaintiff association to inspect any reports of any examination made by the Auditor, or any independent audit of its books and records as of March 31, 1949.

A special meeting of the shareholders of the plaintiff association, called for September 15, 1950 was evidently not held. A new meeting was called for October 11, 1950 and this meeting was continued to October 25, 1950. At the meeting of October 25, 1950, a resolution for the reorganization of the plaintiff association was adopted by a vote of 72.6 per cent or more than the necessary two-thirds of the shares, and five new directors were elected.

On November 16, 1950, the newly elected board of directors filed a motion to substitute attorneys for the plaintiff association and on November 29, 1950, the court entered an order for such substitution. Meanwhile, on November 21, 1950, the Auditor filed his supplemental answer.

On December 12, 1950, the movants-appellants, filed their motion to intervene. The plaintiff association and the defendant Auditor, by the Attorney General objected to such intervention and on December 14, 1950, the court denied the motion to intervene.

On December 18, 1950, the plaintiff association filed its motion to dismiss the cause and on that day, the cause was dismissed and the injunction of September 9, 1950, was dissolved.

The various motions, orders and other proceedings are detailed to show all that took place between the seizure of the books, records and assets of the plaintiff association, on April 1, 1949, to the time of the dismissal of the cause on December 18, 1950. There was no evidence taken in the cause.

The movants-appellants set forth in their motion to intervene that Irving J. Lewis is a share^Aholder of the plaintiff association, a director and the secretary-treasurer. That Albert A. Lewis, trustee, is a shareholder; that the Trust Company of Chicago, a corporation is a shareholder and that David D. Ross and Ann R. Ross are shareholders. The motion to intervene then sets forth numerous matters concerning the seizure of the books, records and assets of the plaintiff association by the Auditor and concerning the reorganization of the association.

Of the six errors assigned, five of them relate to the denial of the motion to intervene and the other error assigned complains that the court erred in not determining the reorganization of the plaintiff association to be void. That point must necessarily be a part of the right to intervene, so that it would appear that the only question before this court is the question of the right of the appellants to intervene.

It must be recognized that the allowance of the motion to intervene by the appellants would allow the appellants to re-litigate the whole matter. By their motion they raise the question of the right of the Auditor to seize the books, records and assets of the plaintiff association in the first instance. They deny by their motion that the reorganization was legal and valid. If their motion is allowed, the whole matter is thus reopened.

It may reasonably be assumed that the appellants were fully informed of all of the proceedings from the time of the seizure by the Auditor to the time they filed their motion to intervene. Thus everything that transpired in the cause, except the dismissal by the plaintiff association of the cause of action and the dissolution of the injunction had already occurred before the filing of the motion to intervene. The reorganization of the plaintiff association had already taken place and by 72.6 per cent of the shareholders, the reorganization had been approved and new officers elected.

An association such as the plaintiff association elects its directors by vote of its shareholders. These officers conduct through a president and vice president and secretary, elected by them, the business of the association. This would include any legal steps taken by the association. The trial court, by recognizing the new association officers, by its allowance of the motion to substitute attorneys, affirmed by its order of substitution, the validity of the reorganization.

If, at any stage of the litigation, the trial court entered an order final in its nature, there could be no intervention to go behind that order. Leave to intervene must be sought during the pendency of the cause. It is never permissible after the issues between the original parties have been determined and a final decree entered. Haase v. Haase, 261 Ill. 30; Groves v. Farmers State Bank, 368 Ill. 35; Fisher v. Capesius, 369 Ill. 598.

The order of the trial court allowing the substitution of

attorneys, by the motion of the newly elected officers of the plaintiff association was such an order, final in its nature. By that order the court recognized the validity and legality of the reorganization and to permit the appellants to attack the reorganization by intervention would be to go behind the order of the court. There is another reason why the appellants should not be permitted to intervene. The action of the shareholders in reorganizing was a representative act of the class of the appellants, namely shareholders, and they were therefore bound by the more than two-thirds per cent of the shares or shareholders in the matter of the reorganization and the election of new officers and cannot as shareholders complain.

^{ex rel.}
People v. Clark, 296 Ill. 46; Greenberg v. City of Chicago, 256 Ill. 213; Harmon v. Auditor of Public Accounts, 123 Ill. 122; Leonard v. Bye, 361 Ill. 185; Groves v. Farmers State Bank, 368 Ill. 35; Sattenstein v. Earl, 328 Ill. 148; Webb v. Gilbert, 357 Ill. 340; Hanna v. Read, 102 Ill. 596; Fisher v. Capesius, 369 Ill. 598.

The order of the circuit court denying the right to intervene was correct.

Judgment Affirmed.

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Abstract

Gen. No. 10610

Agenda No. 12

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MAY TERM, A. D. 1952

347 I.A. 571

HELEN HEITZ, RUTH HEITZ, now RUTH
 HEITZ HOPKINS, and CHARLES HEITZ,
 Plaintiffs-appellees,
 vs.
 ERNEST HERSHEWAY,
 Defendant-appellant.)

)
) Appeal from
)
) Circuit Court,
)
) La Salle County, Illinois.
)

ANDERSON -- J.

Plaintiffs filed their suit in the Circuit Court of La Salle County to recover damages for personal injuries and medical expenses arising as a result of a fire which partially destroyed an apartment building owned by defendant, Ernest Hersheway. The plaintiffs, Helen Heitz, Ruth Heitz, and Charles Heitz, were tenants in an apartment in said building. Among other things, the complaint alleged that the defendant negligently failed to maintain and inspect the electrical wiring in said building. Defendant denied the allegations of the complaint and the cause was tried before a jury. The jury returned a verdict in favor of the plaintiff, Helen Heitz, in the amount of \$5000.00 for her personal injuries and in favor of Ruth Heitz in the amount of \$5000.00 for her personal injuries. The jury returned no verdict in favor of the plaintiff, Charles Heitz. Judgments were entered on these verdicts and the defendant appealed.

An examination of the record indicates that the defendant and his wife owned a two-story apartment building in Streator, Illinois. There were five apartments and a grocery store in this building. One of the apartments on

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the second floor was occupied by Charles Heitz, Helen Heitz, his wife, and Ruth Heitz, his daughter. On October 31, 1943, plaintiff Ruth Heitz opened the door to the apartment and discovered a fire burning in the hallway and on the first floor. Plaintiffs Helen Heitz and Ruth Heitz, were the only occupants of the apartments at that time. Both testified that the flames were such that they were forced to the balcony on the second floor and when the flames came closer they jumped to the ground as a result of which they suffered injuries.

The sole question raised by appellant in this appeal is whether or not there was any competent evidence of negligence on the part of the defendant. It is admitted by appellant that the plaintiffs were using ordinary care and that the verdicts were not excessive. Defendant-appellant contends and assigns as error that the trial court erred in overruling his motion for a directed verdict at the close of appellees' evidence, and in overruling his motion for judgment notwithstanding the verdicts.

A motion for directed verdict or a judgment notwithstanding the verdict presents the single question whether there is in the record any evidence which, standing alone and taken with all its intendment most favorable to the party resisting the action tends to prove the material elements of his case. (Lindroth vs. Walgreen Company, 407 Ill. 121; Gorczynski vs. Pagent, 402 Ill. 147; Weinstein vs. Metro. Life Ins. Co., 339 Ill. 571.)

The material element of the plaintiff's case so far as the question involved in this appeal is whether or not there is any evidence in the record tending to establish negligence on the part of the defendant. In order to determine whether or not there is any evidence which standing alone and taken with all intendment most favorable to the appellees tends to prove the alleged negligence of the defendant, it is necessary to analyze the testimony of the witnesses who testified as to the question of negligence.

Raymond Langrest testified on behalf of appellees and stated among other things that he arrived at the fire first and that the mother and daughter were

then on the balcony and that he saw fire and smoke.

Appellee Helen Heitz testified that she was the wife of Charles Heitz and that early in the evening her daughter went to the door and screamed that the house was on fire. She testified that smoke was pouring in through the apartment door and that she and her daughter went to the porch to get fresh air. When they got on to the porch or balcony, they found there was fire on both sides of the porch and underneath. They tried to return to the apartment, but the smoke was so dense that they could not.

Ruth Heitz testified that when she looked out of the apartment door that there was smoke and flames coming up the stairway; that there was a light fixture in the hallway outside of their apartment which had been going out occasionally; that she was present when her father told appellant about this.

Charles Heitz testified that there was a ceiling light in the hallway on the second floor and a few times it was out and that he asked appellant to replace it which he did. He testified that appellant also called an electrician who was supposed to fix the light.

F. L. Pettet testified on behalf of appellees. He stated that he had been an electrician since 1926; that appellant had called him a couple of months before the fire to repair a three-way switch; that the switch was defective and he installed a new one; that he was called the morning after the fire by appellant and he examined the premises with another electrician, now deceased; that then he examined the electrical wires and the lights. He further testified that he had a conversation with appellant that morning when appellant told him that the bulb had been going out and it had been sparking when he turned it on. He further testified that wires in the hall were burned up; that the wires leading up in the conduit from the basement were melted; that the wires weren't burned in the attic but were burned in the pipe up to the attic; that there was no sign of damage in the attic outside of the wires. He testified that if a wire is sparking and doesn't blow a fuse the wire would heat.

... and ...

(The following information was obtained from a review of the file maintained by the FBI in New York City.)

[illegible]

On cross examination witness Pettet further testified:

Q. "If there were no sparks anywhere, would your opinion have been the same, that the condition that you found could have caused the fire?"

A. "Well, in my opinion, I would say it was caused from the wire in there."

Q. "From what?"

A. "From the wire in that partition."

The above constitutes the testimony in the record pertaining to the question of whether or not there was any evidence disclosing negligence on the part of the defendant.

It is a general rule of law in this state that where a landlord retains control over portions of the premises for the common use of several tenants, that it is his duty to exercise reasonable care to keep the premises in a reasonably safe condition and he is liable for an injury which results to persons from failure to perform such duty. (Shoninger Co. vs. Mann, 219 Ill. 242; Murphy vs. Ill. State Trust Co., 375 Ill. 310.)

Appellant had the duty of exercising reasonable care to keep the premises in a reasonably safe condition and this necessarily contemplated the exercising of reasonable care in maintaining and inspecting the electrical wiring in said building. Plaintiffs alleged in their complaint that defendant having such duty negligently failed to inspect and maintain said electrical wiring.

It is clear that the defendant had notice of the fact that there was something defective in the wiring system and in the proper exercise of his duty to maintain and inspect the wiring should have taken affirmative action with respect to inspecting and repairing said wiring.

In view of the foregoing it is our opinion that there is some evidence taken with its reasonable intendments and inferences most favorable to appellees, tending to establish that there was defective wiring in the apartment building. Based upon the testimony of the expert witness, Pettet, there is also evidence establishing that the fire resulted from such defective wiring. In the absence of any evidence introduced by defendant as to his actions relative to the maintenance and inspection of said wiring other than the

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replacement of the three-way switch, it is our opinion that there is some evidence fairly tending to establish that defendant negligently failed to perform his duty with relation to the maintenance and inspection of said wiring system.

Plaintiffs notified defendant that one of the lights went out and there was sparking when the hall light was turned on. Defendant admitted to witness, Pettet, that he had knowledge of the existence of this condition. Witness Pettet said that the defective wiring system caused the fire. Therefore there are probative facts in this record supporting the inference that the wiring was defective and that it caused the fire. (Lindroth vs. Walgreen Co., 407 Ill. 121.)

It is our opinion that there was evidence of negligence on the part of the defendant and that this issue was properly submitted to the jury. The trial court was correct in refusing to direct a verdict in favor of the defendant at the close of all the evidence and for the same reasons he was also correct in refusing the defendant's motion for judgment notwithstanding the verdict.

Judgments affirmed,

Howe P. J. In my opinion the judgment should be reversed. The evidence does not sustain the allegations of the Complaint.

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